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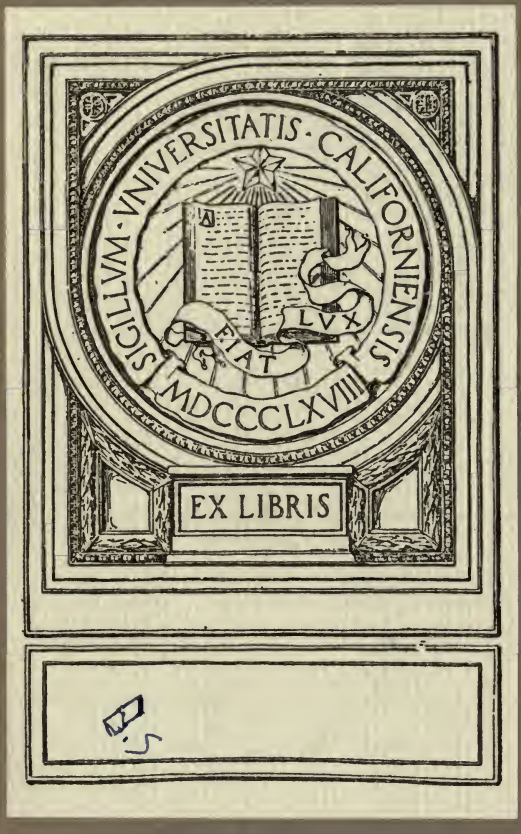
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CHAPTER I

INTRODUCTION

Transitional periods, if unaccompanied by violent commotions, receive scant attention while yet uncompleted, and are fully recognized only after a new epoch has been ushered in. Attention is always focused upon the present dimly related to the past or future and it is only when one stops to compare the present with a distinct time past—five, ten, twenty or a hundred years that the change of conditions is at once apparent. Especially is this true in any particular field if a distinct transitional period has occurred in the interim. Such a period, in the political and constitutional history of America, was the few months during which the government under the Articles of Confederation quietly gave way to the "more perfect union" under the Constitution.

The Articles of Confederation, rudely formed during a struggle for bare existence, by men patriotic but inexperienced in the government of a nation, were not adapted to the needs of the time, and proved inadequate for an era of peace. Even before final ratification by all the states an amendment to increase the authority of the central government by giving Congress the right to levy a five per cent duty on imports had been offered, only to be rejected, and later efforts to amend were equally in vain. Each of the thirteen states retained the sovereign rights of coining money, raising armies and taxing imports and exports. It was to remedy such defects as these that the Convention of 1787 put forth the new Constitution.

The threefold purpose of this monograph is to trace the relinquishment by the separate states of these powers into the hands of the federal government, to discuss the political and constitutional questions involved in consequence of this transfer of power,

and to show the awkwardness and lack of uniformity with which the states did their part toward putting the new government into operation.

A great weakness of the Articles of Confederation was the provision requiring unanimous consent of the states to changes in the Articles,[1] a provision which had defeated the impost, revenue and commerce amendments. The members of the Convention of 1787, therefore, fresh from these past defeats, provided in the seventh article of the Constitution that the ratification by the conventions of nine states should be sufficient for the establishment of the Constitution between the states so ratifying, a provision as necessary as it was revolutionary. But to preserve legal forms as far as possible, and to get the result of its work before the states, the Convention resolved on September 17 to submit the Constitution to Congress, to be transmitted by it to the various states in convention assembled. And in order to insure that the Constitution be put into actual operation when ratified by the requisite number of states, Congress was asked to fix a day upon which electors should be appointed, a day upon which they should assemble to cast their votes for a president, and the time and place for commencing proceedings under the new Constitution.

Congress, then sitting at New York, received the Constitution and accompanying resolves on September 28, 1787, and immediately transmitted them without comment[2] to the various state legislatures to be referred by these last to state conventions. The ensuing ten months proved a period of triumph for the

[1] Article XIII.

[2] "Congress having three states represented by those who were members of Convention, and three of the most influential, each in three other states, resolved to send it on without any recommendation, because its opponents insisted upon having their reasons on the journals, if they offered to recommend it". Arthur Lee to John Adams, October 3, 1787. Adams' Adams, IX. 555.

supporters of the proposed Constitution. Commencing with Delaware on December 6, 1787, one after another of the states took favorable action, until finally on June 21, 1788, the ratification by New Hampshire made the ninth state. It now became the duty of Congress to decide upon the details for putting the new government into operation.

New Hampshire's ratification was received at New York July 2. The question of putting the new government into operation was immediately referred to a committee composed of Carrington of Virginia, Edwards of Connecticut, Baldwin of Georgia, Otis of Massachusetts and Tucker of South Carolina. This committee reported July 14, proposing that the day for the appointment of presidential electors be the first Wednesday in the following December. A proposition was made to amend this, by which the two states with the furthest outlying counties, Virginia and North Carolina (providing the latter should have ratified), should appoint electors on the first Wednesday in December, the three large states of Massachusetts, Pennsylvania, New York (providing the last should have ratified) and the far-off state of Georgia on the third Wednesday, and the remaining states on the fourth Wednesday. This amendment, apparently looking to the people for the choice of electors, was easily negatived, only Connecticut and Georgia favoring it.

By July 28 the report of the committee had been debated and amended to read as follows: "That the first Wednesday in January next be the day for appointing electors in the several states, which have or shall before the said day have ratified the said Constitution; that the first Wednesday in February next be the day for the electors to assemble in their respective states, and vote for a president; and that the first Wednesday in March next be the time, and ——— the place, for commencing proceedings under the said Constitution."[3]

[3] Journals of Congress, edited 1823, XIII. 57.

Although seven more weeks went by before Congress was able to decide upon the seat of the new government, no attempt seems to have been made to change the time as accepted in this amended report. The long delay was the result in part of the unusual requirements necessary to carry any proposition in Congress; and exhibits one of the weaknesses of the Articles; it was necessary that a majority of the thirteen states represented by two or more delegates vote in the affirmative, no matter how many states were absent at the time, or how many gave a divided vote. But there were still other reasons for the indecision. The partisans of New York city had been studiously promoting delay until news might come of the ratification by the state convention at Poughkeepsie, a necessity before New York's claims could be urged. Earnest supporters of the new Constitution, even if free from this sectional feeling, had another and stronger reason for delay; the existing state legislatures were probably everywhere less Federal than the new legislatures to be elected in the autumn. If Congress should at once send notice to the states of the necessary arrangements to be made for putting the new government into operation, it might afford a pretext to convene the existing legislatures in extra session, and thus result in measures unfriendly to the new government.[4]

The contest was one between New York and a more central point, preferably Philadelphia, though several other places were suggested from time to time. Upon the first vote Philadelphia was favored by six states and would have been chosen had not a delegate from Delaware, who really favored Philadelphia, divided the vote of his state in order to have a trial ballot taken upon Wilmington.[5] Consideration of New York was next proposed but, on motion, postponed to try the strength of Lancaster and Baltimore. The former failed, but to the general surprise, the latter obtained the necessary seven votes.[6] As few

[4] Madison to Washington, July 21, 1788. Writings of Madison, V. 238.

[5] Madison to Jefferson, August 10, 1788. Writings of Madison, V. 245.

[6] Ibid.

seriously urged the eligibility of Baltimore, it was plain the question was not yet settled. The debate was resumed on August 5 and 6 and the supporters of New York urged their claims. They admitted that a central situation would be more proper but insisted that necessary accommodations should be furnished, and that such a place should be free from objections which might render it improper or unlikely to be a fit place for the capital, either permanently or until a fit place could be agreed upon. To insure such a location it was urged that permanent decision be left to the new Congress, as being a body less influenced by local attachments and less embarrassed by want of time and means. Furthermore, the removal of the public offices would be attended with much expense, danger and inconvenience, not counterbalanced by the advantages of any place at that time in a fit condition to receive them. And finally, since unnecessary changes of the seat of government would indicate instability and prove injurious to the interests as well as derogatory to the dignity of the United States, it was moved that New York be decided upon as the place for commencing proceedings.

In opposition to this, it was declared that the seat of government should, at the very outstart, be placed as near the center of the Union as possible. There were three reasons for this: first, that its influences and benefits might be felt equally throughout the whole country; second, that persons having business there might approach with equal convenience from the opposite extremes (a powerful argument in those days of wretched traveling accommodations); and third, that there might not be even the appearance of partiality. New York, whether population or distance was considered, was shown to be far removed from the center of the Union. Further, the new Senate was to have only eight members from east of New York, while sixteen were to come from the South; and of the new House of Representatives, seventeen were to come from the East and forty-two from the South. The distance between New York and the extreme

eastern state was hardly one-third of the distance to the extreme southern state. Finally, the appeal was made to the eastern states to commence the new government in the same spirit of mutual accommodation and mutual confidence which had hitherto marked the deliberations, and to reject a measure, which, from its seeming undue regard for local considerations, would naturally occasion jealousies and apprehensions. As a substitute for the previous motion, it was then moved that the seat of the new Congress ought to be in some place to the southward of New York. This motion was negatived seven to six, South Carolina and New Jersey voting with the northern states. Philadelphia, again proposed, was voted down, Georgia being divided. The question recurring on the original motion was carried seven to five, South Carolina and New Jersey voting with the northern states and Georgia still divided.[7]

Thus amended and accepted in piecemeal, the ordinance was finally voted upon a week later, August 13. In the meantime, however, the Rhode Island delegates, refusing to give a final vote for a system to which their state was opposed, had gone home.[8] One of the two New Jersey delegates was also absent, so the ordinance failed of passage by two votes. Thus the whole question had to be taken up anew. To increase the difficulty, the North Carolina delegates had just heard the unfavorable news of the adjournment of their state convention without ratifying the Constitution, and so refused to have anything more to do with the subject. Neither the North nor the South could now muster seven votes, and it seemed as if the operation of the new government would be delayed, if not finally prevented, by inflexibility and jealousy.

During the next three weeks ballots were taken on New York, Wilmington, Lancaster and Annapolis, but the requisite seven votes not obtained for any one of them. By this time,

[7] Journals of Congress, XIII. 67-70.

[8] Writings of Madison, V. 246.

Alexander Hamilton had appealed successfully to Governor William Livingston of New Jersey[9] to instruct the delegates from that state to vote for New York, declaring this would conduce to the permanent establishment of the Capital in New Jersey. The Virginia delegates becoming aware of this plan, were all the more indisposed to yield to New York, feeling that the Capital should be eventually on the Potomac.[10] Futile efforts were made on the second and fourth of September to settle upon a time independent of a place. It was felt apparently that the states could proceed with their arrangements if that much of the question were decided. This plan failed for the want of one vote. At this juncture, to make the situation still more disagreeable, the Maryland delegates withdrew "in a temper."[11] The evident disposition of the northern states to risk or sacrifice everything in support of what the South felt to be an unjustifiable display of favoritism toward their locality, was extremely irritating to the southerners.

No more proceedings on the subject occurred until September 12. On that day it was again moved that the "present seat of Congress" be the place for commencing proceedings. The preamble recited in part, "longer delay in executing the previous arrangements necessary to put into operation the federal government, may produce national injury."[12] A substitute motion providing that a more central place be chosen, but leaving the place blank, was lost. At this point the Virginia and Pennsylvania

[9] Works of Alexander Hamilton, Federal edition, IX. 442.

[10] Madison to Washington, August 15, 1788. Writings of Madison, V. 248. Madison wrote a long letter to Washington on August 24, reviewing the whole situation and offering reasons in favor of Philadelphia which Washington characterized as conclusive. Writings of Madison, V. 256, and writings of Washington, Sparks' edition, IX. 433.

[11] Writings of Madison, V. 260. The Journals of Congress record the Maryland delegates as being present on Sept. 8 but not later.

[12] Journals of Congress, XIII. 102.

delegates, feeling that no alternative remained but to "agree to New York or to strangle the government in its birth"[13] yielded. The two delegates from Delaware moved to strike out "and the present seat of Congress the place," and on the motion as to whether these words should stand, those two states and Georgia (which had usually been divided hitherto) supported the northern states. As the final question was about to be put, Delaware asked and obtained postponement until the following day. On that day, September 13, by the unanimous vote of nine states (Rhode Island, Delaware, Maryland and North Carolina not voting) the arrangements were finally completed. Electors were to be appointed on the first Wednesday in January, they were to cast their votes for president on the first Wednesday in February, and the new government was to commence operations in New York city on the first Wednesday in March, 1789.

This resolution, immediately announced to the states, was received with general approbation. It had been expected for weeks and the delay was beginning to cause considerable uneasiness among the friends of the new government. Washington wrote to Madison that the matter had already become the source of clamor and might give advantages to the Antifederalists.[14] But previous to this, Madison had written to Pendleton that he had been ready for some time to conclude the contest, perceiving that further delay could only discredit Congress and injure the cause, but that his colleagues had not been able to overcome their repugnance to New York.[15] The newspapers had been complaining for some time. The New Jersey Journal for September 10 declared that the pernicious effects of the delay would be

[13] Writings of Madison, V. 261.

[14] Washington to Madison, September 23, 1788. Sparks' Washington, IX. 433.

[15] Madison to Pendleton, September 14, 1788. Writings of Madison, V. 260.

strongly felt in all parts of the Union. The Connecticut Courant for August 25, complaining that sufficient time for framing the necessary act had more than elapsed, said, "The delay does not give satisfaction to the *Masters of Congress, The People,* who scruple not to attribute it to motives, which it is to be hoped do not exist."

Upon the final passage of the act, complaints ceased and attention was turned from Congress to the state legislatures. All classes began to speculate on such new questions as the time of election, the mode of election and the candidates for office.

CHAPTER II

THE FIRST ELECTION OF UNITED STATES SENATORS

Of the three elections necessary in order to put the machinery of the new government into operation, namely those for electors, representatives and senators, that of the last attracted the least attention. This was undoubtedly because the people had no direct part in the choice. Within the respective state assemblies, the action taken was usually a perfunctory registration of votes for men more or less important in the local political life.

The action of the legislatures differed in one interesting but hardly important particular—the preparatory proceedings for the senatorial election. Some states passed specific acts, similar in all respects to legislative acts requiring the approval of the executive, providing for the day, manner and place of the election. Other states settled these matters by a simple, brief joint or concurrent resolution.

Beside the passing interest in the result of the vote, a question of permanent importance had to be decided. This was whether the election should be by vote of the two houses of assembly in joint session or in separate sessions. In many of the states the former method had been used in the election of state executive officials, militia officers or members of the judiciary, and that custom was now quoted as a precedent for the manner of the election of senators. As a result the majority of the legislatures elected by joint ballot. In those few states in which a contest ensued, it usually terminated in favor of the contention of the upper house for an election by concurrent vote.

The first state to take action upon this election as well as upon those for representatives and for electors, was Pennsylvania. No complications between an upper and lower house arose, for at that time the state constitution of 1776, with its pro-

vision for an assembly of a single house, was still in force. The committee on the Federal government, appointed September 18, 1788, reported a bill five days later for the election of representatives and electors, and with the bill a resolution providing that the following Tuesday, September 30, be assigned for the election of two United States senators. Although some objection to such prompt action was made, the resolution was accepted, it being argued that this was a part of the great system for which the assembly was making provision, and action could not prudently be deferred.[1] Previous to the election three men were placed in nomination, Robert Morris, General Irvine and William Maclay. On the appointed day sixty-seven assemblymen were present, and each voted for two persons. The first and only ballot resulted in sixty-six votes for Maclay, thirty-seven for Morris and thirty-one for Irvine. Maclay and Morris were therefore declared elected.[2]

The new state constitution providing for a bicameral legislature went into effect in the autumn of 1790, and in the selection of a successor to William Maclay, whose term of office expired March 4, 1791, a famous quarrel between the houses ensued. The question seems not to have arisen until February 28, 1791, when a resolution was introduced in the state senate, "That both houses of the General Assembly meet in the Senate chamber on Thursday the third of March next, for the purpose of electing, by joint vote, a Senator to represent this state in the Senate of the United States, and that the mode of conducting the present election shall not be drawn into a precedent or example to govern any future election."[3] This was negatived. On March 19, another resolution "that if the House of Representatives agree

[1] Lloyd's Debates, IV. 216.

[2] Minutes of the Assembly of Pennsylvania.

[3] This and the following actions are taken from the Journals of the Senate and of the House of Representatives of Pennsylvania.

thereto.....be and he is hereby chosen by the legislature of this commonwealth one of the Senators to represent this commonwealth in the Senate of the United States," was introduced but not carried. Finally on March 22, the state senate passed the following resolve: "That on the 31st of March, the Senate and House of Representatives.....will proceed to the election of a Senator, in the Congress of the United States, to supply the vacancy in that body, made by the expiration of the period for which William Maclay, one of the Senators, was elected, and that the manner of choosing such Senator shall and is hereby prescribed to be, that each House shall choose the Senator by a *viva voce* vote in each House, and that should the Senate and House of Representatives disagree, each House may report its choice of a Senator until they agree in the choice of one and the same person, and that the name of the person chosen shall be inserted in a resolution to be agreed to by each House." On March 26, this resolution was read in the house, and then ignored till April 11 (long after the date prescribed by the resolution for the election), when it was rejected. On motion of Gallatin the house then resolved, "That on the twelfth inst., at twelve o'clock, the Senate and House of Representatives will meet in the Senate chamber, and then and there proceed (by joint vote of the members of both Houses then present) to the election of a Senator in the Congress of the United States." This was immediately sent to the senate, but received no attention, and the assembly adjourned two days later until August.

When the assembly met in August, 1791, a conference committee was immediately appointed by both houses in order if possible to come to some compromise. On September 9 the house committee reported that the joint committee had held several conferences, the result of which was that the senate committee contended for a concurrent vote, while it believed that the spirit of the Constitution, the expediency of the case and the example of a great majority of the states, all united in support of a

joint vote. On the same day the senate committee reported the disagreement, whereupon it was resolved by a vote of nine to eight that on the next Tuesday, September 13, the senate would proceed to the choice of a senator. The day following, the house approved the conduct of its committee and passed as a resolution, "the members of this house in conjunction with the members of the Senate, will proceed to the election of a Senator.....on Wednesday next." On the thirteenth, the senate rejected this resolution of the house, but when its own order of the day was called up, action was postponed. A few days later the house attempted to break the deadlock by passing a regular bill prescribing the manner of election. The senate amended the bill by providing for the election by concurrent vote, an amendment which the house refused to accept, and before any further action could be taken the assembly adjourned.

Soon after adjournment, there appeared an article in the public press giving the reasons why a minority in the house favored the senate amendment. It was argued that since United States senators were to be chosen by the legislature, and since the legislature of Pennsylvania consisted of two houses, the choice should be effected in the same manner that every other legislative act was done. A choice by joint vote would be a choice by *two houses* acting together, not a choice by the *legislature*. It was further declared that the action by the lower branch of the legislature signified "an attachment to their own house, a desire to extend its influence, and an inclination to wrest the powers of the senate out of their hands."[4] A defense of the house majority for rejecting the senate amendment also appeared. While it was virtually admitted that either method was constitutional, since senators elected by both methods had been admitted to Congress, yet in view of the fact that a deadlock might occur if the election were by concurrent vote the expediency of

[4] Dunlap's Daily Advertiser, October 3, 1791.

the joint session method was urged. It was also claimed that the spirit of the Constitution favored a system in which every member of the legislature had an equal voice, not a system in which a member of the senate had four times the vote of a representative, as was the case in election by concurrent vote.[5]

It was thought that Governor Mifflin might now appoint a senator to fill the vacancy, until the two houses could come to an agreement.[6] This he did not do, however, not feeling sure of his authority. But when the new assembly met in December, 1791, he attempted to stir it to action by declaring in his message that the thing of prime importance, demanding first attention, was the choice of a senator.[7] Notwithstanding this official prod, the session was but a repetition of previous ones—rejected bills and resolutions, barren conferences and addresses to the people.

The next assembly met December 4, 1792. The senatorial question came up at once, and after several considerations of the subject, a bill was introduced in the house, December 17, again advocating the joint session method. The bill passed the house on the twenty-eighth and was immediately sent to the senate where it suffered an even harder fate than its predecessors, being flatly rejected without consideration. The senate, apparently, had lost all patience, and on January 15, 1793, it proceeded to elect a senator according to its own method. Eighteen members were present, but eight declined to vote, entering their reasons in full on the Journals.[8] The other ten members gave a unanimous vote to James Ross. When this action was conveyed to the house, that body declared by a vote of forty-four to eleven that

[5] Dunlap's Daily Advertiser, October 4, 1791.

[6] The Mail, October 4, 1791.

[7] Pennsylvania Archives, Series 4, IV. 201.

[8] Journals of the senate of Pennsylvania, III. 70. The senate, throughout the two years of this contest, had been very closely divided, a bare majority holding out against the lower house. The latter on the other hand, had a large majority, at times four-fifths, against the senate majority.

on constitutional grounds it could take no order on the senate election.

No other action was taken till February 19, 1793, when the eight supporters of the house measures and only seven of their ten opponents were present in the senate at the same time. A resolution was then passed providing for the election of a United States senator by joint ballot, nominations to be previously made. This resolution was immediately sent to the house where it was adopted without delay. Thus through strategy the joint session faction finally attained its end. Previous to the date of election, February 28, sixteen persons were placed in nomination, among them being James Ross, Colonel Henry Miller, Albert Gallatin and former Senator William Maclay. On the day of election the house supporters united on Albert Gallatin and the senate on Henry Miller. Of eighty-two votes cast, Gallatin received forty-five and was declared elected.

When, because he had not been seven years a citizen, the election of Gallatin was declared void by the United States Senate,[9] the Pennsylvania lower house passed a resolution to elect a senator by joint vote. The senate showed signs of balking again, but when it came to a decision, negatived a resolution for a concurrent vote and reluctantly adopted the house resolve. Fourteen persons were placed in nomination, but only three were voted for at the election. James Ross, the successful candidate, received forty-five votes, Robert Coleman, thirty-five, and Samuel Sitgreaves one. Thus, finally, on April 1, 1794, an acceptable senator was chosen for the term commencing March 4, 1791.

Like many of the other apparently constitutional questions of the time, this contest was at heart a political one. The majority in the senate was Federal, in the house, Republican. If the election were by concurrent vote, the senate could hold out against, and possibly in time secure a victory over the house, but

[9] February 28, 1794. See Annals of Congress, 1793-95, 47-62.

if the election were by joint vote, the large house majority would swamp the senate on the first ballot. This was the real significance of the deadlock lasting until 1793. In 1794 the two houses were of the same political faith, and it made little difference which mode of election was used. This explains the yielding of the senate to the house in the latter year.

The Connecticut and Delaware legislatures, following Pennsylvania in point of time, held their senatorial elections in joint session, apparently without question or unusual incident. This was the customary method for the election of several of their state officers. The successful candidates in Connecticut were William S. Johnson and Oliver Ellsworth. In Delaware the council and assembly met together on October 25, at twelve o'clock, and placed George Reed, Gunning Bedford and Richard Basset in nomination. At three o'clock of the same day, another joint session was held and Reed and Basset were elected.[10]

In Virginia the choice of senators was interesting, not because of any unusual method employed in the election, nor of any contest between the two houses, but because the anti-constitutional party in that state was making a last desperate attempt to thwart the operation of the new Constitution by forcing Congress to call a second general convention. It was necessary to the success of this movement that friends of the Constitution must not be sent to Congress, hence the struggle was carried into the senatorial election.

On the first of November, 1788, Patrick Henry moved that on November 8 the two houses proceed by joint ballot to the choice of two senators to represent Virginia in the United States Senate.[11] Both houses agreed and on the sixth of November candidates were nominated. The only person brought forward by the Federalists was James Madison. Three weeks earlier, in writ-

[10] Minutes of the Council of Delaware.

[11] Rives' Madison, II. 648.

ing to Governor Randolph on the subject, Madison had said, "I mean not to decline an agency in launching the new government if such should be assigned me in one of the Houses, and I prefer the House of Representatives, chiefly because if I can render any service there, it can only be to the public, and not even in imputation, to myself. At the same time, my preference, I own, is somewhat founded on the supposition that the arrangements for the popular elections may secure me against any competition which would require on my part any step that would speak a solicitude which I do not feel, or have the appearance of a spirit of electioneering which I despise."[12] But when his friends expressed a strong preference for him over any other Federal candidate for the senatorship, he waived all objections, though at the same time, from the political complexion of the assembly, he did not expect to be elected.

For the Antifederal party, two candidates, Richard Henry Lee and William Grayson, were nominated, Henry taking the unusual liberty of naming both. A letter from Governor Randolph to Madison, describing the proceedings on the day of nomination, says, "Mr. Henry, after expatiating largely in favor of Mr. Lee and Mr. Grayson, concluded that yourself, whose talents and integrity he admitted, were unreasonable on this occasion, in which your Federal politics were so adverse to the opinions of many members. Your friends Page, Corbin, Carrington and White were zealous, but the last gentleman, having in the connection of his idea something about instructions, acknowledged that it was doubtful whether you would obey instructions which should direct you to vote against direct taxation. 'Thus gentlemen,' rejoined Mr. Henry, 'the secret is out; it is doubted whether Mr. Madison will obey his instructions.' "[13]

[12] Madison, to Edmund Randolph, October 17, 1778. Madison's Writings, V. 276. See also V. 296.

[13] Conway's Randolph, pp. 120-121.

Henry urged in particular that Madison was against amendments, a telling argument in an assembly committed, as it already was, to the principle of amendments at any cost. This public philippic against Madison had its desired effect. At the election on the eighth, Lee received ninety-eight votes, Grayson eighty-six, Madison seventy-seven and sixty-seven votes were given to persons not nominated.[14] Thus Virginia elected two declared Antifederalists to the Senate.

The first choice of senators in New Hampshire was by concurrent vote. This was the more strange because the two houses were accustomed to meet in joint session for debate on important matters—as they did, for instance, to consider the best method of carrying into effect the resolves of Congress relative to the new Constitution.[15] But the journals of neither house nor of any other extant records contain an account of any question arising as to whether or not this was the proper mode of electing senators. On November 11, the lower house, by a vote of sixty to three proposed John Langdon as one of the senators.[16] The day following, the senate concurred in the choice of Langdon, and chose Josiah Bartlett as his colleague. At the same time the house selected Nathaniel Peabody, and then waited to see what the senate would do with this choice before acting on that body's recommendation. The senate, however, by a vote of two to eight non-concurred in the election of Peabody, and the house then concurred in the choice of Bartlett. Bartlett declined to serve, and on January 1 the house selected Paine Wingate in his place, a decision to which the senate agreed.

The Massachusetts general court, in contrast to the New

[14] Ibid. Each person of the 164 who voted named two candidates. Randolph says that at least fifty of the sixty-seven votes given to men not nominated, came from Madison's friends, who thus threw away their second vote rather than assist Lee or Grayson.

[15] State Papers of New Hampshire, XXI. 349.

[16] Ibid., XXI. 356, 357.

Hampshire assembly, had considerable trouble in deciding upon an election method. The joint committee on the new government made a detailed report November 4, in which it was recommended that in the choice of senators, each branch of the legislature have a negative upon the other.[17] The house did not readily accede to this, and the committee was called upon to defend its action. To quote the Massachusetts Centinel, "Mr. Dawes explained the reasons which induced a majority of the reporting committee to agree to it—he said the Federal Constitution had directed that the choice should be by the Legislatures of the several States. In order to ascertain what was meant by the term Legislature, a recurrence was had to the constitution of this State, and it had there been found that the Legislature consisted of the two branches of the General Court, acting on each other by a *negative*. The Committee therefore could do no other than report as they had."[18] As the house considered that mode of election prejudicial to its privileges, the acceptance of the report was negatived by a great majority. A deadlock, lasting for two weeks, ensued, but finally on November 20, a compromise between the two houses was effected. It was agreed that the choice of presidential electors should be by joint ballot, and the choice of senators by concurrent vote. On the following day the house proceeded with the election of two persons, Caleb Strong and Charles Jarvis. The senate at once concurred in the election of Strong, but non-concurred in that of Jarvis, proposing John Lowell instead. The house would not agree to Lowell's election and chose Jarvis a second time. The senate, in turn, sent down its second non-concurrence, this time proposing the name of Azor Orne. The house refused to accept Orne and persisted in naming Jarvis, but for the third time the senate non-concurred and brought forward Tristram Dalton. Both houses seemed de-

[17] Massachusetts Centinel, November 5, 1788.

[18] Ibid., November 8, 1788.

termined and an indefinite contest was foreshadowed, but just at this juncture Jarvis withdrew. The house then chose Nathan Dane but the senate insisted upon Dalton, and on November 24, the house concurred in the latter's election.[19]

In New Jersey the "joint meeting" had a regular organization. Annually, at the beginning of each new legislature, the two houses came together and elected officers of the joint meeting to serve one year. Many important questions and all elections of state officers came before this body. This explains the tenth section of the act for carrying the new Constitution into effect in New Jersey, passed November 21, 1788.[20] By this section it was provided that two citizens of the state, qualified as the constitution directed, should be chosen by the state legislature assembled in joint meeting. The governor of the state was authorized to commission the persons so chosen, under the great seal of the state. On the day following the passage of the bill, the council proposed to the house a joint meeting on the following Tuesday, November 25, at the college library room,[21] for the purpose of electing senators and other officers.[22] The house promptly acquiesced, and at the prescribed time and place, twelve councillors and thirty-eight assemblymen were present. Each had the privilege of voting for two persons. Four candidates were placed in nomination: William Paterson, Abraham Clark, Jonathan Elmer and Elias Boudinot. Of the one hundred votes cast, Paterson received forty-five, Elmer twenty-nine, Clark nineteen and Boudinot seven. Paterson and Elmer were declared elected.[23] It is worthy of remark that in this case, judging by the returns, a concurrent vote would not have changed the result. Of the twenty-four votes cast by the councillors, Paterson received

[19] Massachusetts Centinel, November 22, 1788, et seq.

[20] New Jersey Session Laws.

[21] The assembly was meeting at Princeton.

[22] Journal of the Proceedings of the Legislative-Council.

[23] New Jersey Journal and Political Intelligencer, December 3, 1788.

twelve, Elmer had seven, Clark three, and Boudinot two; while of the seventy-six votes by the assemblymen, Paterson received thirty-three, Elmer twenty-two, Clark sixteen, and Boudinot five. All four candidates were professed Federalists, though it was thought Clark favored amendments.

The Maryland legislature passed no law on the subject of the election, but it was agreed by a concurrent resolution that the election should be by joint ballot, that no person should be chosen except by a majority of the attending members of both houses, that one senator should be a resident of the western shore and one of the eastern shore, and that the election should take place December 9.[24] On that day thirteen of the fifteen members of the senate, and seventy of the seventy-six members of the house of delegates attended the joint session. John Henry and George Gale were put into nomination for the eastern shore, and Charles Carroll and Uriah Forrest for the western shore. On the first ballot Henry, Gale and Forrest each received forty-one votes, and Carroll forty. Since eighty-three members were present no candidate had received the necessary majority of forty-two, and a second ballot was taken. It resulted as follows: Henry forty-two, Gale forty, Forrest forty-one and Carroll forty-one. Henry was therefore declared elected as the senator from the eastern shore, and adjournment was taken until the following day. The first ballot cast when the joint session reassembled resulted in the election of Carroll, forty-two votes being given to him and thirty-nine to Forrest.[25] Had the Maryland election been by concurrent vote, either a deadlock would have resulted or it would have been necessary to effect a compromise between the two houses, for, on the first ballot, forty of the seventy members present from the lower house voted for Henry and Forrest, while twelve of the thirteen senators present

[24] Session Laws of Maryland, 1788.

[25] Independent Gazetteer, December 18, 1788.

favored Carroll and Gale.[26] Possibly, even as it was, the result was a compromise, for Henry, supported by the house majority, was chosen over Gale, while Carroll, supported by the senate majority, was chosen over Forrest.

The South Carolina and Georgia legislatures chose their senators early in the year 1789. Little more than the names of the successful candidates, and the fact that they favored the Constitution is known. The Georgia legislature, similar to the Pennsylvania assembly, was composed of but one house at that time, and being free from inter-house struggles, had no difficulty in making James Gunn and William Few its choice. The election in South Carolina was probably in joint session, the mode followed in the choice of presidential electors. Pierce Butler and Ralph Izard were returned.

The absence of any constitutional provision or congressional law specifically describing the manner of the choice of senators was felt most keenly during the first election in New York, where a deadlock in the legislature deprived that state of representation in the United States Senate for the greater part of the first session of Congress. The upper house of the assembly contained a very small Federal majority while the lower house was Antifederal in the proportion of about seven to five. This gives the key to the situation at once, though upon its face the contest was altogether a constitutional one.

The assembly met December 10, 1788. Ten days later the senate passed a bill providing for the election of Philip Schuyler

[26] Nothing has been found to indicate that this contest was anything more than the result of personal rivalry. Carroll and Gale were unquestionably Federalists, but there is no apparent evidence that Henry and Forrest were Antifederalists. The house of delegates was certainly Federalist, as is proved by the law it passed for the election of representatives, and hence would not have supported Antifederalists. Possibly Henry and Forrest belonged to the middle party favorable to constitutional amendments by Congress.

and Robert Yates, but when it came before the house it was rejected without debate. The house, meanwhile, had framed a general election bill for senators, representatives and presidential electors, which it passed December 22. In the election of senators, this bill provided that the senate and assembly should each openly nominate as many persons as there were senators to be chosen, after which nomination both houses should come together and compare the lists. Those persons named in both were to be declared elected, and in case only one man was so chosen, from the remaining persons whose names were on one list only the other senator was to be chosen by joint ballot.[27]

The senate passed the bill, but with amendments wholly changing its character. For electing senators, the upper house substituted the following: "The senate and assembly of this state shall, if two senators are to be appointed, openly nominate two persons, and shall respectively give notice each to the other of such nomination; that if both houses agree in the nomination of the same person or persons, the person or persons so nominated and agreed to shall be the Senator or Senators to represent this state in the Senate of the Congress of the United States; that if the nomination of either house does not agree in any of the persons nominated by the other the Senate shall on the same day openly choose one of the persons nominated by the assembly, and the assembly shall on the same day openly choose one of the persons nominated by the Senate, and the two persons so chosen shall be the Senators to represent this state as aforesaid; that in every case where two Senators are to be chosen, and both houses agree only as to one in such nomination as aforesaid, and in every case where only one Senator is to be chosen, either of the two houses of the legislature may propose to the other a resolution for concurrence, naming therein a person to fill the office of Senator, and if the house receiving such resolution shall concur there-

[27] Pennsylvania Packet, January 18, 1789.

in, the person so named in such resolution shall be the Senator, but if such resolution shall not be concurred in, either house may on that or any future day, proceed to offer to the other a resolution for concurrence from time to time until they shall agree upon a Senator."[28]

The amended bill received an adverse vote in the house, but according to Article XV, of the state constitution, before it could be finally rejected, a joint session or conference had to be arranged and "managers" appointed by each house to present its point of view. This conference was arranged for January 5. Duane, L'Hommedieu and Schuyler were appointed to speak for the senate; Jones, Adgate and G. Livingston were to perform a like office for the house. A great debate, lasting almost the entire day, ensued. It was urged in behalf of the original bill that it followed the plan directed by the state constitution and was therefore the only constitutional method. To this it was replied that the new Federal Constitution had made certain parts of the state constitution null and void. The latter had indeed provided for the election of members of the Continental Congress by joint vote, but under the new regime the only authority for the appointment of senators was derived from the Federal Constitution. The house managers demurred, saying that the new Constitution did not expressly do away with or contradict the election provision of the state constitution; the latter was still in force and should be employed. In that case, answered the senate managers, since it was clear that United States representatives were as much "members of Congress" as were senators, they ought also to be elected by joint ballot of the two houses,—a deduction plainly following the house arguments, though as plainly unconstitutional. But, it was rejoined, the senate amendment was not conformable to either of the constitutions, since the language of both was that of *choosing* or *electing,* whereas the idea in the amendment barely amount-

[28] Pennsylvania Packet, January 18, 1789.

ed to an *appointment.* A joint vote is an *election* by the legislature, they argued further, while a concurrent vote is simply an *appointment* by an *act* of the legislature. An appointment by an act was precisely the proper method, replied the senate speakers. The new Constitution prescribed, "the times, places and manner of holding elections for *senators* and representatives shall be prescribed in each state by the *legislature* thereof." That is, the legislature, in New York the senate and house, must act as it usually acts, since no other mode is dictated,—and the two houses in New York "act by and have a negative upon each other." The house ignored this and advanced a new argument. The assembly was nearer the people, and in a case of this kind ought to have more power in the choice; this was the principle upon which the state constitution had been formed. The senate managers denied this and affirmed that the state constitution had established an equality between the two branches of the legislature, which the house plan would destroy. As a last resort the house managers urged the acceptance of their plan on the grounds of expediency: the senate plan was not conclusive, and if the two houses could not agree, no appointment would follow. In answer it was stated that the senate amendment copied the plan used satisfactorily in the passage of laws.[29]

At the conclusion of the conference the assembly rejected the amendment by a vote of thirty-five to twenty-four: the senate refused to recede by a vote of eleven to eight, and the bill was lost. About two weeks later the house passed another bill providing for the choice of senators, but it contained provisions exactly similar to those of the bill which had failed. The senate passed the bill with the same amendment as before. A conference was again held but neither side would compromise, and the bill was lost. Spasmodic efforts to come to an understanding were continued, but all were fruitless, and the legislature finally adjourned March 3, with no senators appointed.

[29] Pennsylvania Packet, January–February, 1789.

The contest was now transferred from the legislature to the voters of the state. The election of state officers was to be held April 28, and both parties made strong efforts to win.[30] The gubernatorial contest attracted the greatest attention, but the struggle to control the legislature was a close second in interest. The final returns showed that the honors were divided. The Antifederalists were successful in the choice of a governor, Clinton winning by about four hundred votes, but the Federalists had a majority in the legislature. On June 4 Governor Clinton issued a proclamation convening the legislature in special session at Albany July 6.[31] Although no definite reason was given, it was surmised by the press of the country that the special business was the election of senators.[32]

On July 8, two days after the legislature had met, a bill directing the manner of appointment of United States senators was presented to the house. In brief, it provided for an election by concurrent vote, thus justifying the position which the senate had held at the previous session. Each house was to nominate the number of persons to be elected. If the nominations agreed, those nominated were to be declared elected. Otherwise, if two persons were to be chosen, the house was to choose one from the two senate nominations and the senate one from the house list. If only one senator was needed, or if two were to be chosen and only one had been agreed upon in the first nominations, the election was to be by concurrent vote.[33]

This bill passed the house July 10, and the senate July 13. Just at this point the Council of Revision came forward in support of the Antifederalist position. This Council was composed of the governor, chancellor and judges of the supreme court, and

[30] Pennsylvania Packet, May 8, 1789. The state was "convulsed by parties."

[31] Independent Gazetteer, June 10, 1789.

[32] Independent Gazetteer, June 30, 1789.

[33] Ibid., July 22, 1789.

had authority to return to the legislature, together with their written objections, all bills which they considered improper to become laws. Then, unless passed by a two-thirds vote of both houses in separate session, such bills failed.[34] On July 15, the Council of Revision returned the bill prescribing the manner of electing senators, with the following objections:

"I. Because the Constitution of the United States directs that the Senators be chosen from each State by the Legislature thereof. If by the Legislature is intended the members of the two houses not acting in their legislative capacity, no law is necessary to prescribe the mode of election; concurrent resolutions extending in this case as well to the mode of election as to the choice of persons, and the bill, as far as it goes, operates as a restriction upon the constitutional rights of the two houses. If the Legislature are only known in their legislative capacity, the Senators can constitutionally be appointed by law only, (that is, each house having a negative upon the other) and no considerations arising from inconvenience will justify a deviation from the Constitution of the United States.

"2. Because this bill, when two Senators are to be chosen, enacts that in case of the disagreement of the two houses in the nominations, each house shall, out of the nominations of the other, choose one, and that such person shall be the Senator to represent this State; and thus, by compelling each house to choose one of two persons, neither of whom may meet with their approbation, establishes a choice of Senators by the separate act of each branch of the Legislature, in direct opposition to the Constitution of the United States, which in the third section of the first article, declares that they shall be chosen by the Legislature."[35]

The house refused to pass the bill in the face of these ob-

[34] New York Constitution of 1777, Article III.

[35] Street's Council of Revision of the State of New York, p. 290. Albany, 1855.

jections, and immediately afterward adopted a resolution providing for the choice of senators by concurrent vote. This mode being acceptable to the senate, the house proceeded to nominate Philip Schuyler and James Duane. The senate by a vote of thirteen to six concurred in the choice of the former but rejected the latter, proposing instead Ezra L'Hommedieu. On the following day the house non-concurred in the choice of L'Hommedieu, and by a unanimous vote nominated Rufus King. The senate immediately concurred, thus finally completing the election.[36]

North Carolina and Rhode Island, represented in the United States Senate in the second and third sessions of the first Congress, both chose senators by ballot in joint session, the custom followed in the selection of state officers. This system was modified in North Carolina by a peculiar arrangement in which each house in separate session, at the close of the joint session, concurred or non-concurred in the action of the joint session.[37] This arrangement, however, apparently did not affect the choice of senators.

The North Carolina convention ratified the Federal Constitution November 21, 1789. Three days later the house proposed to the senate that on the following Thursday, November 26, the two houses should proceed to the choice of United States senators, accompanying the proposition with the names of twelve persons as candidates. The senate agreed to both the resolution and the nominations. On the first ballot in joint session, the legislature elected Samuel Johnston by a large majority,[38] but failed to concentrate on a second choice. Another ballot was accordingly arranged for December 2, with three persons in nomination. But three successive sessions, on as many different days, had to be

[36] Independent Gazetteer, July 24, 1789.

[37] When the joint session chose Alexander Martin as governor to succeed Johnston, the senate withheld its concurrence because it had been suggested that Martin was not eligible. State Records, XXI. 661.

[38] Ibid., XXI. 628.

held before Benjamin Hawkins was finally chosen on December 8.[39]

The Rhode Island assembly was convened in special session immediately after the ratification of the Constitution, and an act was soon passed making provision for the election of two senators and one representative. The former were to be chosen "agreeably to the usage in the choice of state officers by this General Assembly, joined in a grand committee, and not in separate houses, and by ballot, and not otherwise."[40] The successful candidates were Joseph Stanton, first, and Theodore Foster, second.[41] In order to enable them to take their seats in Congress, it was voted to loan to each one hundred fifty dollars, to be repaid with interest upon their return.[42] Both took their seats in Congress June 25, 1790. This made the representation of the thirteen states in the upper house of that body finally complete.

A summary of the results of this first election of United States senators reveals the fact that despite the wide-spread dif-

[39] Hawkins took his seat in Congress on January 13, and Johnston on January 29, 1790.

[40] Rhode Island Colonial Records, X. 385.

[41] Rhode Island Colonial Records, X. 387. Stanton was an Antifederalist and had voted against the adoption of the Constitution. W. R. Staples, Rhode Island in the Continental Congress, p. 673.

Foster was a Federalist from Providence and had worked hard for the adoption of the Constitution. Collections of the Rhode Island Historical Society, VII. 121-122.

No information as to who were the opposing candidates, nor as to the number of votes received, is extant. It would seem probable that at the election each member of the assembly voted for one person, the two receiving the highest number being elected. In that case the assembly, which had an Antifederalist majority, would naturally give the highest number of votes to an Antifederalist, who would then be "first senator," while the minority would unite to give the second highest number of votes to a candidate of its party. This man would then be "second senator."

[42] Rhode Island Colonial Records, X. 386.

ference of opinion as to the proper procedure in such elections, a large majority of the legislatures decided in favor of the joint session method. In two states, Pennsylvania and Georgia, the assemblies at that time were composed of a single chamber, and hence the election was a very simple matter. Of the remaining eleven states, only three, New Hampshire, Massachusetts and New York, chose their senators by concurrent action of the two houses.

CHAPTER III

THE FIRST ELECTION OF UNITED STATES REPRESENTATIVES

During the same few months that the states were deciding for the first time, just how the appointment of senators should be made, they were also making their first provisions for the election of United States representatives. None of the states had taken any action previous to the autumn of 1788, but the subject had been discussed in the newspapers of the country during the summer, and the people had become familiar with the respective advantages and disadvantages of two plans, a district system and a general ticket system. One writer had suggested a combination of the two modes, namely, that the respective states divide themselves into as many districts as there were members to be chosen, direct the voters to fix upon a member from each district, and then let the entire state vote for the whole number of members. By this mode, he declared, a knowledge of the local interests of every part of the state would be carried to Congress, but in such manner as not to interfere with the general interest of the whole state, the agriculture and commerce of the states would always be kept in friendship with each other, and none but men of real character and abilities would be returned, for such men are generally best known throughout every part of a state.[1] By the plan of choosing federal representatives at large, a friend of the general ticket urged, the pernicious acts of caballing and influencing would be avoided, and the best chance of obtaining the best man and the best abilities afforded.[2] The Constitutional provision that the legislatures of the respective states should

[1] Massachusetts Centinel, July 23, 1788.

[2] Ibid., November 1, 1788.

prescribe the times, places and manner of holding the elections[3] showed no preference for either mode, and in deciding the question, the various state legislatures were generally guided by motives of policy, or by election custom.

A variety of election laws was passed, immediately after the passage of which, the political parties in the several states began to take measures for bringing suitable candidates before the public. It is very difficult, owing to the paucity of records of any kind, to follow these movements, but the political activities may be traced in three or four states.

Pennsylvania led off in favor of the general ticket system. The state as a whole was Federal, but there were strong Anti-federal sections which, had the district system been adopted, would have returned representatives from that party. So it was obviously the part of political wisdom for the assembly, which was strongly Federal, to adopt the general ticket system. Such an argument was not given by the supporters of that system on the floor of the assembly, however. There, when the report of the special committee showed that it favored the general ticket system, its opponents urged, on the grounds of expediency, that only by the district system could eight men[4] have a particular knowledge of the local and common interest of their constituents throughout the state. To this it was replied that the district sys-

[3] Constitution, Article 1, section 4.

Madison, in the Constitutional Convention, said, "These were words of great latitude. It was impossible to foresee all the abuses that might be made of the discretionary power. Whether the electors should vote by ballot, or *viva voce*, should assemble at this place or that place, should be divided into districts, or all meet at one place, should all vote for all the representatives, or all in a district vote for a number allotted to the district—these and many other points, would depend on the legislatures, and might materially affect the appointments."

Elliot's Debates, edition of 1861, V. 401.

[4] Pennsylvania was entitled to eight representatives.

tem was unconstitutional since it placed another qualification, not named in the Constitution, upon the candidate, namely, that he be an inhabitant of that particular district, or part of the state, from which it was proposed to choose him. If the state were divided into eight districts, each to choose one member, how could any one of them be called a representative of Pennsylvania, or how could confidence be reposed in a person disagreeable to seven-eighths of the inhabitants of the state,—not an impossible case. Moreover, when a person so chosen went to Congress, a body which judged the qualifications of its own members, might it not be urged against him that he was not a representative of Pennsylvania because he had been elected by only one-eighth part of the state, and for this reason the election be declared irregular and set aside.[5] These arguments overcame the feeble opposition and the general ticket plan was easily carried.[6] The act as passed provided for an election to be carried on in accordance with the general election laws of the state, on the last Wednesday of the following November. Each person voting was to deliver in writing on a slip of paper the names of eight persons to serve as representatives. These were to be selected from the citizens at large who were duly qualified by the United States Constitution. The eight receiving the highest number of votes were to be declared elected.[7]

Two political conventions were held in the autumn of 1788.[8]

[5] Lloyd's Debates, September 24, 1788.

[6] In proof that this was a political measure, see a letter from Benjamin Rush to Jeremy Belknap, October 7, 1788. "——— Our state has taken the lead in making arrangements for setting the new Government in motion. By obliging the whole state to vote in one ticket it is expected the Federalists will prevail by a majority of two to one in the choice of Representatives for the lower house of Congress." Collections of the Massachusetts Historical Society, sixth series, IV. 418.

[7] Pennsylvania Session Laws, October 4, 1788.

[8] J. S. Walton, Nominating Conventions in Pennsylvania, American Historical Review, II. 262 et seq.

The first, convened at Harrisburg September 3, a month before the passage of the election law, was called by the Antifederalists, primarily to discuss the revision of the Federal Constitution, but secondarily to nominate a list of persons for representatives and electors. No evidence is at hand to prove that the second object of the meeting was completely carried out, though a tentative list of names may have been agreed upon. Ten weeks elapsed between the meeting and the publication of the nominations, during which time the ticket was fully and finally decided by correspondence. It first appeared in the newspapers of Philadelphia, November 12, in an address to the freemen of Pennsylvania, signed by "A friend to Liberty and Union."[9] This address referred to the Constitution, with its lack of amendments, as containing two great defects. The first of these was the unlimited power of Congress; the second, the want of provisions securing the rights of the individual. The article went on to say that the writer had learned, from his correspondents throughout the state, of a widespread desire to see the Constitution amended. And in the belief that the new Congress, if properly selected, would take the initiative in securing such amendments, it had been thought wise to place in nomination for representatives the following men: William Findley, Charles Pettit, William Irvine, Robert Whitehill, William Montgomery, Blair McClenachan, Daniel Heister and Peter Muhlenberg. This was known to the Antifederalist papers as the Whig ticket, but it was not completely Antifederal. Its promoters gave as a reason that a purely party ticket would not represent all classes of the population. The suspicion arose that at bottom it was a scheme to catch votes, and such a charge was later made.

The second convention was held by the Federalists November 3, at Lancaster. Its sole purpose was to nominate electors and representatives. This "conference" had been called immediately

[9] Independent Gazetteer, November 12, 1788.

after the passage of the election law, and the party supporters in the different counties had at once held meetings and appointed instructed delegates. In Philadelphia "The Friends to the Federal Government" met at the state house, October 11, and appointed a ward committee to nominate delegates.[10] This committee reported on October 18, in favor of James Wilson and George Latimer, who were thereupon elected. The same committee was then further instructed to name six suitable Philadelphians, from among whom the city's share of the congressional delegation might be chosen.[11] These names were reported at a third meeting October 25.[12]

In some of the county meetings general requisites rather than specific persons were recommended. The party in Northumberland, a typical county, gave the following instructions to guide its delegates in choosing congressional nominees: "let integrity and decency of character be considered as the first qualification, industry and application to business as the second. No brilliancy of talents, or show of knowledge, should atone for the want of the above qualities. Thirdly, extensive information, and some degree of practice in agriculture, commerce and manufactures, with a general knowledge of the laws of the land are necessary. But as it may be objected, that men qualified in all the above respects cannot easily be found—and that different men adapted to the different interests might be chosen, we recommend something of the following kind: That two able merchants who may attend to the interest of commerce, one person remarkably attached to the interests of manufactures, and an eminent law character, with four substantial yoemen, should form our representation in Congress."[13] It was also advised, because of the large body of Ger-

[10] Pennsylvania Packet, October 13, 1788.

[11] Ibid., October 20, 1788.

[12] Ibid., October 27, 1788.

[13] Ibid., October 23, 1788.

man voters in the state, that a part of the representation be able to do business in the German language.

The state conference was held at the appointed time and place. Thirty delegates, representing every county in the state except Luzerne, were present and nominated the following men: Thomas Hartley, Henry Wynkoop, George Clymer, Thomas Scott, Thomas Fitzsimons, F. A. Muhlenberg, Stephen Chambers and John Allison.[14]

The German voters of the state were dissatisfied with both tickets because they included so few men of that nationality. Not having time, however, to form a new ticket, they revised those already in the field in such manner that each German might vote for his own party, and at the same time for three Germans. For Chambers and Allison of the Federal ticket, they substituted Heister and Peter Muhlenberg, two German Federalists on the Antifederal ticket; and the name of Whitehill on the Antifederal ticket they replaced with that of F. A. Muhlenberg, a German Federalist on the Federal ticket.[15] Thus, there were four tickets before the voters, no one completely independent of the others.

During the next two weeks a vigorous campaign was carried on. The Federalists urged the voters to support the new Constitution, the Antifederalists appealed for the protection and preservation of the liberties of the people. In the election, held November 26, Philadelphia and its surrounding counties returned large Federal majorities, and it seemed that the full Lancaster ticket had been elected. But as the reports from the more distant counties gradually came in, majorities appeared on the other side. Especially was this true of the returns from Cumberland county, which out of a total of about 1850 gave a majority of about 1300 to the straight Harrisburg ticket. The final result showed the Federal ticket, as revised by the Germans, to have won, F. A.

[14] Pennsylvania Packet, November 8, 1788.

[15] G. D. Luetscher, Early Political Machinery in the United States, pp. 128-130.

Muhlenberg leading with 8736 votes, and the other successful candidates running from 450 to 1300 votes behind him. A total vote of about 14615 was cast.[16]

The general ticket system was put into operation in Connecticut also, but not as a political move. In that state the twelve assistants or magistrates were chosen annually on a general ticket, and this was the easiest and most natural method for the choice of representatives. The time and manner of proceeding were arranged as follows: the freemen were to meet in their respective towns on November 10, and each was to vote for twelve persons qualified for representatives. The presiding officers of the town meetings were then to send the result of the vote to a committee consisting of one person from each of the eight counties in the state. This committee was to meet November 19, sort and count the votes and publish the names of the twelve persons having the greatest number. The towns were then to hold a second meeting on December 22, when each freeman was to vote for any five of these twelve persons. The results of this second meeting were to be sent to the general assembly which was to meet January 1, and the assembly was to sort and count the votes, and declare the five persons elected.[17]

The election was apparently conducted without political excitement.[18] The twelve persons nominated November 10, were all men of ability, active in state and continental affairs, and all were evidently Federalists. At the election on December 22, the voters returned the first five on the list, namely, Jonathan

[16] Independent Gazetteer, January 2, 7, 1789.

[17] This does not appear in the session laws, but was passed as a resolve, and is in the Connecticut Courant of October 20, 1788. The Courant does not give any of the debates of the assembly.

[18] The Connecticut Courant is almost destitute of any news of this election.

Sturges, Benjamin Huntington, Jonathan Trumbull, Roger Sherman and Jeremiah Wadsworth.[19]

New Hampshire also decided in favor of the general ticket system. By the provisions of an act passed November 12, 1788,[20] the election was appointed for the third Monday of the following December. Each qualified person was entitled to vote for three representatives, the full quota from New Hampshire. In order to be elected, a candidate had to receive a majority of the whole number of votes cast. If there should be failure to elect any or all of the three, the general court was directed by law to make out a list of persons receiving the highest number of votes,—the list to include twice as many as there were representatives lacking. These names were to be sent to the towns, and a second election held on the first Monday of the following February.

The situation was complicated on December 15, the third Monday, by an excessive number of candidates. With only three to be elected, votes were cast for seventy.[21] As 15377 votes were counted, and each qualified citizen was allowed to cast his ballot for three candidates, 5126 persons must have voted. One over one-half, the necessary majority to elect, would have been 2564, but as no candidate received such a vote, a second election, to take place on the first Monday in February, 1789, was ordered, and a list of the six persons standing highest sent out to the voters.[22] On February 21, 1789, the president and council of the

[19] The remaining seven nominees were S. M. Mitchell, John Chester, James Hillhouse, Erastus Wolcott, Jesse Root, John Treadwell and Jedediah Strong. Massachusetts Centinel, November 29, 1788.

[20] Laws of New Hampshire, 1789.

[21] Pennsylvania Packet, January 23, 1789.

[22] The vote for the six candidates standing highest at the first trial was as follows:

Benjamin West, 2374	Samuel Livermore, 2245	Paine Wingate, 2054
Abiel Foster, 1236	John Sullivan, 1053	Nicholas Gilman, 861.

Massachusetts Centinel, January 14, 1789.

state, having examined the returns from the second trial, announced that Benjamin West, Samuel Livermore and Nicholas Gilman had been chosen.[23] Mr. West at once resigned, and an election to fill that vacancy was ordered to take place June 22, 1789. The New Hampshire delegation was then completed by the choice of Abiel Foster.[24] Party politics had apparently influenced the situation little or not at all. Of the six persons standing highest in the election returns at the first trial, all were Federalists. The seventh on the list, Joshua Atherton, had been opposed to the ratification of the Constitution on moral rather than political grounds, being inimical to its provisions concerning slaves and slavery.[25]

New Jersey, the fourth state to decide in favor of the general ticket plan, also put into operation a popular nomination system. But this feature of her law was very unlike that in Connecticut, and did not serve so well to eliminate surplus candidates. It was enacted that any qualified voter might nominate four persons, the quota of representatives to which New Jersey was entitled. These nominations, to be made in writing, were to be deposited, at least thirty days previous to the election, with the clerk of the court of common pleas of the county in which the person making the nomination resided. The clerks in the respective counties were then to transmit the nominations to the governor, who was to publish them in the state newspapers and send complete lists to all the sheriffs. No persons except those on this list could be elected. The election was to be by ballot, and commence on the second Wednesday in the following February. The election judges were to forward the returns to the governor, who, with the assistance of the executive council, was

[23] State Records of New Hampshire, XXI. 257.

[24] Massachusetts Centinel, July 21, 1789. The election of Foster completed the election of representatives to the first Congress from the eleven ratifying states.

[25] Appleton's Cyclopaedia of American Biography, I. 114

to sum up the whole number of votes cast, and commission the four persons receiving the highest number.[26]

The law of November 21, 1788, providing for an election in the following February, had scarcely passed before electioneering began. The contest was not one between political parties, but between sections of the state. Before the legislature adjourned, a complete congressional ticket (later known as the Western ticket),[27] composed of two persons from East Jersey and two from West Jersey, was formed in a secret caucus of members of the assembly. The origin of this ticket was designed to be a secret, but the truth soon leaked out, whereupon the following article appeared. It was published in the New Jersey Journal, was addressed to the inhabitants of New Jersey, and was signed "A Freeholder."

"Within a few weeks you will be called upon to give your suffrages for *four men* to represent you in the Congress of the United States. This important privilege ought to be estimated by you at its true value, and your unbiased judgment should be exercised upon this occasion. And now, my fellow citizens, suffer me to warn you from being misguided by some of those who, for quite another purpose, you have placed great trust in.

"I happened lately to be at Princeton, where a number of *great men* were sitting, and I discovered that a junto had formed a ticket for you, which is to be secretly ushered into the several counties as if not coming from them; as I do, from my heart, most cordially abhor and detest all secret cabals and juntos, I think it a duty incumbent upon me to apprize you of their conduct that you may avoid the snare that is privately laid for you.

"The ticket which they have formed consists of the following names: *Elias Boudinot* and *James Schureman* of East Jersey, and *Lambert Cadwalader* and *Thomas Sinnickson* of

[26] Session Laws of New Jersey, November 21, 1788.

[27] It is not easy to explain why this became known as the West Jersey ticket. Perhaps it was because its chief promoters were West Jersey men.

West Jersey. Some of these gentlemen, if it had not been for the very improper manner in which they are attempted to be passed on you, might be well entitled to your votes; but under the present circumstances, as we have many as suitable men, it will be proper to reject them; and particularly at this time, as a lesson to our *great men* not to meddle with matters which do not belong to them.

"I shall, in a future paper, present you with some strictures upon the conduct of two of those gentlemen, which will, I trust, satisfy you that they ought not to be the men of your choice; at present I shall close, after using a privilege which every citizen is entitled to, that is, of nominating four candidates, who I intend to vote for— *Jonathan Dayton* and *Thomas Henderson* of East Jersey, and *John Cox* (of Trenton) and *Joseph Ellis* (of Gloucester) of West Jersey. These gentlemen have at least one advantage over the others—they are not proposed by a secret junto."[28]

The following number of the Journal contained a sarcastic reply which, while it virtually admitted that the "Freeholder" was correct in his statements as to the origin of the ticket, declared in substance that the "great men" were better acquainted throughout the state than the ordinary citizen, and so better qualified to suggest proper persons to send to Congress.[29] No other

[28] New Jersey Journal and Political Intelligencer, December 10, 1788. If the author of this public letter was correct, and the result of the election indicates that he must have been, this is the record of a caucus antedating by about a month the Maryland caucus, which Luetscher (in his Early political Machinery of the United States, pp. 107-108), calls the first. It also appears that Luetscher is mistaken in his conclusion, "the Convention was the only state machinery that ever gained a foothold in New Jersey."

[29] New Jersey Journal, December 17, 1788. Considering the later success of this ticket, it is probable that much correspondence and personal work was done to further its interests.

defense of the action of the caucus and no address or appeal in behalf of the Western ticket appeared. Newspaper efforts were directed chiefly towards attacking or defending individual candidates rather than complete tickets. The merits of several other tickets were presented from time to time, though apparently none became known as distinctively "Eastern" in opposition to the Western ticket. According to the provisions of the election act, the governor was to publish in the newspapers of the state and of Philadelphia and New York, eighteen days prior to the election, the list of persons legally nominated. This list came out January 19, and contained fifty-four names, including all of the chief public men of the state[30]

The polls opened, as provided by law, on the second Wednesday in February. By the latter part of the month, seven of the eight eastern counties had closed their polls and sent their returns to the governor.[31] On February 27 the governor summoned the council to meet him at Elizabethtown March 3, but no more returns had been received by that date, and after fixing upon March 10, as the time for closing all the remaining polls of the state, the council was adjourned to March 18.[32] In the meantime the eastern counties were becoming incensed at the western counties for not sending in the returns. It was freely declared that the delay was due to a desire to profit by a knowledge of the returns from the eastern part of the state.[33] In consequence of this hard feeling, Essex, the one eastern county which had not made up its returns, determined to disregard the order of the governor and council to close the polls by March 10, and to simply adjourn the polls until March 18.[34] By the time of the second meeting of the council therefore, while the five western

[30] New Jersey Journal, January 21, 1789.

[31] Ibid., February 25, 1789.

[32] Independent Gazetteer, March 14, 1789; New Jersey Journal, March 18, 1789.

[33] Pennsylvania Packet, March 16, 1789.

[34] Ibid.

counties had sent in their returns as ordered, the Essex polls were still open.[35] On March 19, Governor Livingston issued a proclamation reciting the provisions of the election act which authorized him to call a meeting of the council to sum up the results of the election, and declared that the meeting had convened on the 18th, but that one of the thirteen counties was yet to be heard from. As the state might suffer detriment, however, by remaining unrepresented in Congress, the governor and privy council thought it for the public good and agreeable to the true intent and meaning of the act, to proceed with the canvass of the votes from the twelve counties. The decision of the legality of the election as thus decided was to be left "to whom it appertains." Whereupon James Schureman, Lambert Cadwalader, Elias Boudinot and Thomas Sinnickson were declared to have received the greatest number of votes from the twelve counties. "All those whom it may concern," the proclamation concluded, "are to take notice and govern themselves accordingly."[36]

Rumors to the effect that this did not end the affair, that Congress would be asked to interfere, at once began to circulate. It was pointed out that from the whole tenor of the proclamation three conclusions might fairly be drawn. These were that the governor himself entertained strong doubts of the legality of the election and returns; that he had thought proper to refer the decision thereupon to the House of Representatives ("to whom it

[35] Maryland Journal, March 31, 1789.

[36] Independent Gazetteer, April 1, 1789.

The returns from the eastern counties gave the four leading places to Schureman, Clark, Dayton and Hoops. With the exception of Schureman the members of the Western ticket received scant support in the east, Boudinot dropping to ninth place, Cadwalader to tenth, and Sinnickson to fourteenth. (New Jersey Journal, February 25, 1789.) But the heavy vote in the five western counties for the caucus nominees overcame the adverse vote of the east.

appertains") and this in such terms as carried with them a strong recommendation to the House to take it under consideration; and lastly, that bare certificates agreeing in substance with the proclamation, instead of commissions under the great seal, would be issued to the four gentlemen in question.[37] The situation was briefly described by Madison in a letter to Washington, as follows: "In New Jersey the election has been conducted in a very singular manner. The law having fixed no time expressly for closing the polls, they have been kept open three or four weeks in some of the counties, by a rival jealousy between the Eastern and Western divisions of the State, and it seems uncertain when they would have been closed if the Governor had not interposed by fixing on a day for receiving the returns, and proclaiming the successful candidates. The day is passed, but I have not heard the result. The Western ticket..... is supposed to have prevailed, but an impeachment of the election by the unsuccessful competitors has been talked of."[38]

This talk soon developed into action. Under the sanction of one of the candidates from Essex (supposedly Abraham Clark), petitions to Congress praying that the election might be set aside were circulated.[39] These petitions were presented to Congress on the 28th of April, and on the following day were referred to the committee of elections. The friends of the Western ticket had not allowed all this activity to pass unnoticed. Counter petitions were circulated through the state and reached Congress May 12 and 15. On the 25th of May the House appointed a special committee before whom the petitioners were to appear and present such proofs and allegations as they might wish to offer in support of their petitions. The committee was also to

[37] New Jersey Journal, April 1, 1789.

[38] Writings of Madison, V. 330. Writing to Jefferson, Madison spoke of the inaccuracy of the New Jersey law as producing a delay almost equal to that in New York.

[39] Maryland Journal, April 3, 1789.

hear the opponents of each petition, and then report to the House all the facts in the case.[40]

On July 14, the committee stated to the House that certain allegations in the petition required testimony which they did not consider themselves authorized to collect, as it would have to be taken in New Jersey. The question had also arisen as to whether the petitioners might be aided by counsel, and the committee requested the direction of the House on these matters.[41] A long debate on the proper mode of procedure ensued, but no decision was reached, and the subject was dropped until August 18, when the main facts of the New Jersey election were reported.[42] This report came up for debate September 1 and 2, and both petitioners and counter petitioners were well supported on the floor of the House. The main question at issue was over the authority of the New Jersey governor to declare the result of the election before the returns were all in. Upon the premises all were agreed,—the New Jersey law declared the election of Congressmen should be in the same manner as the election of representatives for the state legislature; the law for the election of the latter fixed no time of limitation for the receipt of returns, but the practice had been to send them in time to declare the result before the date of meeting of the legislature; the late law had evident respect to the time at which Congress was to meet, and so by reasonable construction the intention of the law was that the election should be declared before the day appointed for the assembling of Congress. But at this point the arguments diverged. Upon the one side it was held that the result should have been declared on March 3, and that the governor had no right to extend the time for receiving returns beyond that day. If he could extend the time one day he could do it for an unlimited number of days, and so defeat the law. But, ad-

[40] House Journal, First Congress, p. 40.

[41] Lloyd's Congressional Register, II. 76.

[42] House Journal, p. 83.

mitting that he had a right, it became a question as to how long he should delay. The law declared that the result was to be fixed by *the greatest number of votes from the whole state.* Evidently then, the governor would have to wait until all the votes were in. This would put the power of defeating the law into the hands of a single county, but that was the fault of the state assembly in passing such an imperfect law, and the state would have to suffer.

This construction was pronounced absurd by those who supported the validity of the election. It might have happened, they argued, that no county would have made returns by March 3; would it then have been required that the governor declare the persons elected? On the other hand, to wait until all the returns had been made would have placed the power of defeating the election with one county,—a construction foreign to the spirit of the law and disastrous to the state. This was one of those cases in which the executive might properly interpose his discretionary authority where the law was dubious and yet must be carried into operation. Such authority had been properly used to postpone the determination of the results for such a reasonable time as would allow the returns to be sent in. At the end of that time twelve of the thirteen counties had actually made returns, and Congress was assembling with the state unrepresented. The governor was then justified in announcing the election.[43]

After a debate of two days this latter view was accepted, and the New Jersey members were declared to be duly elected and returned.[44]

Georgia and Maryland each adopted a plan which was evidently a compromise between the general ticket and district systems. In the Maryland assembly a committee which had been appointed to bring in a bill for the election of representatives reported November 24, 1788. Its plan was that the people of the

[43] New Jersey Journal, September 9 and 16, 1789.

[44] House Journal, p. 95.

western shore, by an election in each county, elect four representatives, and the people of the eastern shore in the same manner elect two.[45] This was negatived and it was resolved instead that the state be equally divided into six districts. A proposition that each district elect one representative was voted down, and then it was resolved that the people of the state entitled to vote should vote for six persons, one to be from each of the six districts, the person in each district receiving the greatest number of votes of all the candidates in that district to be declared elected. The bill as finally passed carried out this resolution. In addition it was enacted that the election should be viva voce and should be held the first Wednesday of the following January.[46]

While the Antifederalists in Maryland were in a decided minority, the feeling between the two parties, owing to the tactics of the Federalists in the state convention, was extremely bitter.[47] Soon after the passage of the election law, both parties took steps to carry their contest to the polls. The ticket of the Antifederalists was announced as coming from "a number of gentlemen who are zealous guardians of the rights of the people, and avowedly opposed to that aristocratic spirit and influence which are dangerous to Public Liberty, and already too prevalent in the councils of this state."[48] Its promoters warmly recommended their nominees to the citizens of Maryland as a respectable and safe representation in that crisis of public affairs.

The Federal ticket was brought out at Annapolis by a caucus of members of the general assembly and friends of the Con-

[45] Maryland Journal, January 13, 1789.

[46] Maryland Session Laws, December 22, 1788.

[47] Elliot's Debates, II. 547-556.

[48] Maryland Journal, December 26, 1788. The ticket included George Dent, J. Seney, J. F. Mercer, Samuel Sterett, W. V. Murray and A. Faw

stitution.[49] It was immediately indorsed at a meeting in Baltimore and a committee to advertise it throughout the State was appointed. An address to be sent to influential men in each district and to be published in the newspapers was adopted. "With respect to the gentlemen nominated for Representatives," so the address ran, "we have reason to believe that the framers of the ticket were careful to select persons acceptable throughout the state for honor and integrity, unequivocal friends to the new Constitution, of mature experience in governmental concerns, and well acquainted with the general interests of the United States; and we trust, if elected, that they will so approve themselves to their countrymen and the World. But should the friends of the new government, in the different districts, unfortunately conceive that they can find men better qualified for Representatives than the above named, and vote, each according to their several opinions, without concerting a new ticket, the consequence must be, the certain loss of the Federal Ticket, without their carrying the men they vote for. Such a measure, at this juncture, it is justly apprehended, would throw everything into the hands of the Antifederalists, who will, no doubt, on this as on former occasions, be unanimous in support of their ticket.

"The necessity of a strict union of votes among the Federalists will further appear from contemplating the Antifederal ticket. The contrivers of that ticket have artfully introduced into it some Federal characters, in the hope that their deserved popularity, in their several counties, would draw to them the votes which would otherwise be given to members of the Federal ticket,[50]

[49] Maryland Journal, December 30, 1788. The Federal ticket was as follows: M. J. Stone, J. Seney, Benj. Contee, William Smith, George Gale, Daniel Carroll.

[50] Joshua Seney, W. V. Murray and, probably, A. Faw were the Federalists who were placed on the Antifederalist ticket. This was the same plan, it will be remembered, by which the Pennsylvania Antifederalists had hoped to win.

by which means they expect to divide the Federal interest, and thereby increase the chances in favor of the Antifederalists; for it is plain that whatever will lessen the number of votes for any member in the Federal ticket, will be a decided advantage to some member in the opposition ticket—and this advantage must be in favor of the Antifederalists who will vote alike, and without any division."[51]

Beyond the issuing of this address, little electioneering was done because of lack of time, for the election occurred January 7. The general returns showed that the Federal voters had heeded the above appeal to unite on the caucus ticket, and, as was predicted, the Antifederalists had also voted solidly for their party. Few votes were cast for candidates outside of these two lists.[52] The Federalists were completely successful, receiving over

[51] Maryland Journal, December 30, 1788.

[52] Returns given in the Maryland Journal, January 23, 1789.

The following extract of a letter from a German farmer in Washington County, Maryland, gives a good description of the manner in which the election was conducted in country districts. Washington County cast 1164 votes for every one of the successful candidates on both the congressional and electoral tickets, and no votes for any other candidate. This letter, written to a friend in a less unanimous district, throws light on the reason for the unanimity of Washington County.

"We had pain when we heard of the people of your district that they were wrong, and we thought it right to call the friends of the new government to give in their votes at the court-house, so we made out so many as 1167 [1164] for the Federal ticket, and no man said against it. The last day you would wonder to see so much people together, two or three thousand maybe, and not an Anti. An ox roasted whole, hoof and horn, was divided into morsels, and every one would take a bit. How foolish people are when so many are together, and all good-natured. They were as happy to get a piece of *Federal ox* as ever superstitious Christians or Anti-Christians were, to get relics from Jerusalem. . . . Much attachment and good will is shown for the cause. I was afraid of mischief by the cannon, and such numbers of folks together; but our people are well-minded, and we hope, under the new government, our happiness will be made secure. . . . I am sorry for your differences, but they don't injure us. Even the name *Federal* will soon be forgotten here; there is no *Anti* to keep it in remembrance." Pennsylvania Packet, January 23, 1789.

two-thirds of the total vote cast. Political contention did not cease, however, with the election. Newspapers busied themselves at once expressing the dissatisfaction. The election law came in for its share of blame. One writer took up each of the six districts of the state, showed the number of estimated votes, the number of votes actually cast and for whom cast, and reached two conclusions. His first was that of 20700 votes in the state, only 8195 were cast.[53] His second was that had the law allowed the people of each district to vote for one representative, not confining them to elect a resident of the district but one of the state, the following persons, on the face of the returns, would have been elected: Joshua Seney, Daniel Carroll, Samuel Sterett, J. F. Mercer, George Dent and George Gale—that is, three Federalists and three Antifederalists. He characterized the law as unconstitutional because it added another qualification for representatives.[54] In answer it was acknowledged that since the Federalists had been in power in the state assembly, they had constructed the law in such a manner as to make the success of the Federal ticket most probable. But it was also maintained that, had the opposite party been the stronger, they would have taken that advantage for themselves.[55]

Georgia, through its militia organization, was already divided into three brigade districts. As the state was entitled to three representatives, it was enacted that each voter, while voting for three persons, must choose one from each of these three sections. Candidates had to be of three years' standing residence in their respective districts, and the election was appointed for February 9, 1789.[56]

[53] Other writers contended that his estimate of the number of voters was too low, but at any rate the number of votes cast was considerably under one-half the number of electors in the state.

[54] Maryland Journal, February 3, 1789.

[55] Ibid., February 13, 1789.

[56] "An Act for appointing the time, manner, and places for holding elections for representatives in Congress," January 23, 1789. The substance of this act is in the Independent Gazetteer, March 11, 1789.

Little is known of the Georgia election beyond this date and the names of the candidates chosen. The law was approved January 23, leaving little time, even had there been inclination, for electioneering. In the first or eastern district, General James Jackson was chosen over Henry Osborne. The latter had voted in favor of the ratification of the Constitution in the state convention, but, so far as is known Jackson was also on that side.[57] In the second or middle district, Abraham Baldwin was returned, and in the third or western, George Mathews. Baldwin had been a member of the Continental Congress from 1785 to 1788, and a member of the Federal Convention at Philadelphia. Mathews had been a member of the state convention which ratified the Constitution.

A still nearer step to the pure district system was taken by the two states of New York and South Carolina. The latter state was divided by the legislature into five districts, each to choose one member, but a candidate did not need to be an inhabitant of the district for which he was chosen. It was provided that if a person was chosen by two different districts, he was to decide within twenty days which he would serve, and a second election was to be held in the district left without a representative. The election was to be held at the usual time for the election of assemblymen.[58] According to the state constitution, this was the last Monday in November and the day following.

For the election in that state the records are just as bare as for Connecticut, but from the results it seems that the contest was more exciting. Of the five representatives returned, four

[57] Georgia had ratified the Constitution unanimously. We are thus left without this means, used in many of the other states, of checking off the opponents of the Constitution. U. B. Phillips, in his Georgia and State Rights, American Historical Association Reports, 1901, II. 21, gives the only known records of the Georgia convention.

[58] Statutes at large of South Carolina, V. 84. November 4, 1788.

were Antifederalists.[59] From the district of Camden came General Thomas Sumter who had endeavored in the state convention to have action on the Constitution postponed. From Ninety-six was returned Aedanus Burke, who had worked and voted against the Constitution. And from the other two country districts Daniel Huger, and T. T. Tucker, both former delegates to the Continental Congress, but both Antifederalists, were elected. Charleston alone returned a Federalist, William Smith.

The choice of Smith gave rise in Congress to the first case of contested elections. On April 15, 1789, David Ramsay, of South Carolina, petitioned the House to set aside the election of Smith, alleging that at the time of his election lack of citizenship for the requisite seven years had rendered him ineligible. This case was taken up carefully by Congress, as the mode of investigation and the decision might be precedents for all future cases. It was decided on April 18, that the proofs of Smith's ineligibility should be presented to the committee on elections, Smith to have the right to examine witnesses and to introduce counter proofs. A month later, after the committee had presented a statement of facts, a lengthy debate ensued over the question as to whether to continue the proceedings in the House, or to recommit with instructions to read the documents and to present a shortened report. On the grounds that the Constitution had provided that the House should be judge of its own elections, and that it would be very improper to delegate this power of judgment to any group of men, the House decided to examine the evidence and to give decision itself.

It was shown against Smith that he was born in 1758 while

[59] Hildreth (IV. ch. 1) concludes that "a sudden revolution in the politics of South Carolina" had caused the election of this Antifederal delegation. This is not borne out by the facts for the country districts which elected Antifederalists had voted in the legislature against calling a state convention, and had voted in the convention, though with less unanimity, against the Constitution. Elliot's Debates, IV. 253 et seq.

South Carolina was still a British colony, that his parents had died many years before the Declaration of Independence, that he had resided abroad from 1770 to 1783, and that he had been elected to Congress in 1788, not having been a citizen of the United States the constitutional period of seven years. Ramsay contended that citizenship in the United States could be acquired only by birth or inheritance, by being a party to the Revolution, by taking an oath of fidelity to some one of the states, by tacit consent, or by adoption. By none of these modes, the petitioner alleged, had Smith gained citizenship.

In reply Smith submitted that South Carolina had in fact considered him a citizen. Under the state constitution, no one was eligible to a seat in the legislature until he had resided three years, nor to a seat in the council until he had resided five years, in the state, yet he had held a seat in both bodies before he had been two years in the state and no one had objected. His parents indeed had died before independence was declared but his guardians, who stood in loco parentis, were residents of Charleston. As a member of the society of South Carolina, he owed and paid allegiance to the King of England before the Revolution, but when that society separated from Great Britain his allegiance was transferred with that of the society of which he was a member. The legislature of South Carolina had taken this same position in an act passed in 1779, by which it was provided that young men sent abroad for their education should be allowed to remain until they reached the age of twenty-two, after which, if they had not returned, they should be doubly taxed. This implied that citizenship remained in the state, though there was a penalty to pay for absence.

Taking these statements into consideration, the House decided by a vote of thirty-six to one that William Smith, at the time of his election had been seven years a citizen of the United States.[60]

[60] Clarke and Hall, Cases of contested elections in congress, 1789-1834, pp. 23-37.

In New York, the bill which passed the lower house December 22, 1788, providing for the election of United States senators and representatives and presidential electors, and which afterwards failed in the senate, divided the state into six districts, each to choose one representative from the state at large. Efforts were made to amend in the house by including the condition that the person chosen by a district should be an inhabitant of that district, but this was rejected on the ground that it prescribed an additional qualification, and so was unconstitutional. Efforts were also made to amend by a proposal to strike out the district feature because, it was argued, persons chosen by the districts did not represent the state. This was rejected on the ground that the people could not possibly be acquainted with six proper persons throughout the state, and so would not know for whom to vote.[61] The bill, which finally became a law did not materially differ from the above. Each qualified person was to vote for one representative who should be an inhabitant of the state. The election was to be held on the first Tuesday in March, and the vote canvassed and the successful candidates announced the first Tuesday in April, 1789.[62] This was the latest date fixed by any of the eleven states for the election of representatives.

Judged by the lower house of the assembly of 1788-1789, the state was clearly Antifederal, and had a general ticket system prevailed this party would probably have elected the full state contingent. But when it was the district system that went into operation, the Federalists had high hopes of electing two members from the southern part of the state, the stronghold of their party.[63] As the campaign progressed, the Antifederalists were seen to be losing ground, and before the returns were canvassed, the Federalists claimed the election of William Floyd from the

[61] Pennsylvania Packet, January 6, 1789.

[62] Session Laws, January 27, 1789.

[63] Alexander Hamilton to T. Sedgwick. Works of Hamilton, IX. 456.

district composed of the counties of Suffolk, Queens, Kings, and Richmond, of John Lawrence from the New York city district, and of Egbert Benson from the district of Dutchess and Worcester counties.[64] The final canvass showed not only the election of these three, but also of Peter Sylvester, a Federalist from the strong Antifederal district of Columbia, Washington, and Clinton counties.[65] The Antifederalists were successful in two districts. From Ulster and Orange counties they elected John Hathorn, and from the district of Albany, Jeremiah Van Rensselaer.

The states adopting a pure district system were Massachusetts and Virginia. The committee in the Massachusetts general court which had the matter in charge presented a report November 4, 1788. In so far as it related to the election of representatives, it provided for the division of the state into eight districts. Each of these districts was to choose one representative, but the inhabitants were not obliged to confine their choice to a citizen of that district. The districts were to be made as nearly equal as possible without dividing counties. An absolute majority vote only could elect. In case no person received such a majority the voters were to decide at a second poll between the two candidates highest on the first returns. Should these two receive an equal number of votes at the second trial, the members of the legislature from that district were to choose between the two.[66]

[64] Madison to Washington, March 19, 1789. "The Federalist party calculates on an equal division of the six." Works of Madison, V. 330.

[65] Life of Peter Van Schaack, by Henry C. Van Schaack, New York, 1842, p. 429.

In Dutchess and Worcester counties, Benson was hard pushed by T. Bailey. The latter received 574 votes while Benson had only ten more. Freeman's Journal, April 15, 1789.

R. B. Lee wrote to his friend, L. Powell of Virginia, April 13, 1789, "Strange that the sense of the people of this state [New York] should also be contrary to that of the legislature." Branch Papers, I. 220.

[66] Massachusetts Centinel, November 5, 1788, et seq.

Against the strong opposition of Berkshire county, the members from which declared it had not received justice in districting the state, the report was adopted, but with important changes. It was decided that each representative must be an inhabitant of the district from which he was chosen, and no provision was made for limiting the number of candidates to two in case a second election was necessary. If no choice was made at the second election a third was to be held, and so on until there was a choice.[67]

Political activities in Massachusetts cannot readily be followed, partly because there was no extra-legal machinery for nominating candidates, and partly because personal electioneering was despised and would have hurt rather than helped the candidates' chances, but chiefly because the district system localized party conflicts. Only a few months before, in choosing members of the state convention to act upon the national Constitution, the mass of voters had shown itself strongly Antifederal, and it was wholly because of the tact and talent of the Federal leaders that the Constitution had been ratified. Since that time public sentiment had changed considerably in favor of the Constitution party,[68] and the state was now so evenly divided that in nearly every district the election was warmly contested. As the resolve of the general court fixing upon December 18 for election day was not passed until November 20, less than a month intervened in which the respective parties might decide upon suitable candidates. In that short time many names were proposed. Without time or machinery for the elimination of surplus aspir-

[67] Acts and Resolves of Massachusetts, October Session, 1788.

[68] "A striking instance of the rapid progress of federal principles was seen at Attleborough . . . . at the election of a representative for the new federal government. The Hon. George Leonard had 88 votes, the Hon. Phanuel Bishop 12 votes. By the above vote it appears that Attleborough is now more than 7 to 1 federal, whereas in April, 1787, said Hon. Bishop had a majority of votes in said town for a senator." Pennsylvania Packet, January 6, 1789.

ants, union of party sentiment was impossible, and where such a union would frequently have brought party success, its lack resulted either in defeat or, because the other party was equally divided, at best a draw.

Four of the eight districts, however, managed to elect representatives at the first trial. In Suffolk the three leading candidates were Samuel Adams, Fisher Ames and General Heath, all Federalists who had supported ratification in the state convention. Adams, known as the "amendment monger," was supposed to be only luke-warm in his advocacy of the Constitution and, while strongly defended by a few of his Federalist friends, was supported mainly by the Antifederalists. Ames, on the other hand, had debated eloquently for the Constitution, and although he had seen far less public service than Adams or Heath, was more popular at the moment. In spite of the deflection of votes to Heath, Ames prevailed in the election by a narrow majority. The southern district (Plymouth and Barnstable) easily returned George Partridge, a Federalist and a former member of the Continental Congress, who ran against James Warren, prominent in the Revolution. The district composed of Bristol, Dukes, and Nantucket elected General Leonard, and the eastern or Maine district returned George Thacher, both Federalists.[69] For the four remaining districts a second election was ordered, to take place January 29.

In Middlesex at the first trial, Elbridge Gerry, conspicuous in public service for years, but one of the three delegates at the Philadelphia Convention who at the last minute had refused to sign the Constitution, was pitted against Nathaniel Gorham, a staunch Federalist and supporter of the Constitution as well as a colleague of Gerry at Philadelphia. Gorham would probably have been chosen had not J. B. Varnum and General J. Brooks, two members of the state convention who had favored the Con-

[69] Pennsylvania Packet, January 20, 1789.

stitution, also been candidates.[70] Gorham withdrew before the second trial[71] and Gerry was elected, but only after he had published an address to the electors declaring his opinion that as the new system had been adopted, every citizen of the ratifying states was in duty bound to support it, and that opposition to a due administration of it would not only be unjustifiable, but highly criminal.[72]

The contest in Essex at the first trial was between men rather than parties, for the two principal candidates were both Federal. Neither was able to score a victory because over one-third of the total vote was scattered among the large number of other candidates entered. At the second election, January 29, Benjamin Goodhue, an able merchant and a state senator, was chosen by a large majority.[73]

The greatest struggle in Massachusetts took place in the two western districts, the chief seat of Shays' Rebellion. Neither of these districts was able to make a choice at the first or second poll, and a third was accordingly ordered for March 2. In Worcester district the two foremost candidates, Jonathan Grout and Timothy Paine, were both Antifederalists. Artemas Ward was their chief opponent. A union of Antifederalists would have resulted in an election at the first trial, but it was not until the third that the friends of Grout by a great effort succeeded in electing him. Grout had been a Shays partisan in 1786, and at the state convention had voted against the Constitution. In the district composed of Hampshire and Berkshire counties, Thomas Sedgwick, a Federalist of Berkshire, was opposed to William Lyman an Antifederalist of Hampshire. The local feeling between the

[70] The result of the first trial was as follows: total vote cast 1473, necessary for a choice 737, Gorham received 536, Gerry 384, Varnum 254, Brooks 106, and scattering 193. Pennsylvania Packet, January 20, 1789.

[71] Pennsylvania Packet, January 19, 1789.

[72] Austin's Gerry, II. 93.

[73] Massachusetts Centinel, February, 1789.

two counties became almost as bitter as the party feeling.[74] To complicate the difficulty there were several other candidates; Skinner of Berkshire, a Federalist who had voted for ratification in the state convention drew many votes from Sedgwick, while Whiting of Hampshire lessened the Lyman vote. A fourth trial and following that a fifth were necessary before Sedgwick was chosen May 11, by a majority of eight in a total vote of four thousand and ninety-five.[75] This finally completed the Massachusetts delegation, six of her representatives being Federal and two Antifederal.

In Virginia it was the part of political wisdom for the Antifederalists, who controlled the legislature, to divide the state into districts. In that way they were sure to elect a part of the state quota of ten members—and politically diplomatic, to say the least, was the districting they did. To the constitutional qualifications for representatives were added the further requirements that the candidate be a "discreet and proper person" who was a freeholder and had been a bona fide resident of his district for twelve months.[76] Within seven days after the election, which

[74] Hampshire Gazette, May 6, 1789.

[75] The towns were allowed two weeks in which to send in their returns. Owing to the negligence of returning officers, seventeen towns favorable to Lyman were unreturned at the last election. Had the vote in these towns been properly sent in, Lyman would have been elected. Massachusetts Centinel, May 30, 1789.

The vote for Sedgwick and Lyman at the different trials was as follows:

	Total vote.	Sedgwick.	Lyman.
December 18,	2201	801	330
January 29,	2513	716	717
March 2,	4731	1449	1557
March 30,	3328	1564	1309
May 11,	4095	2056	1958

Massachusetts Centinel, May 30, 1789, and previous numbers.

[76] Hening, XII. 653 et seq.

was to be held, February 2, 1789, the sheriffs in each district were to meet, canvass the vote and issue a certificate to the candidate standing highest.

The majority in the assembly[77] was well organized and well directed, ready to make the most of its advantage. Certain parts of the state were known to be strongly Federal, and other parts as strongly Antifederal. In districting, the latter party endeavored to group the counties so as to secure the greatest possible benefit to themselves, and several remarkable contests resulted.[78] In the eighth district, composed of the counties in the southeastern part of the state, Thomas Matthews, the principal Federal candidate, was opposed to Josiah Parker. The district was normally Federal, and in the election of members of the state convention Parker had been badly beaten.[79] But in the congressional election Matthews was handicapped by the appearance of other Federal candidates, and Parker managed to squeeze in.[80] The sixth and ninth districts, situated in the southern part of the State, the center of Antifederal strength, also elected party exponents, Isaac Coles and Theodoric Bland.

[77] See page 70.

[78] Rives' Madison, II. 654.

O. G. Libby, in his Distribution of vote on the Federal Constitution, p.34, shows that the state was divided politically into four sections. In the eastern counties eighty per cent of the vote had favored the Constitution; in the middle district seventy-four per cent opposed it; the West Virginia section stood ninety-seven per cent for, while the Kentucky district was ninety per cent against.

[79] R. A. Brock, History of the Virginia Federal Convention of 1788, II. 376. 2 Vols., Richmond, 1891.

[80] Before his election Parker was a naval officer at Norfolk, Virginia. He wrote to Governor Randolph, February 9, 1789, that he was probably elected but would not resign his office yet, as a disputed election might deprive him of the honor of taking his seat in Congress. He did send in his resignation a few days later, however. Calendar of Virginia State Papers, IV. 561, 566, 568.

The great contest in Virginia took place in the fifth or central district, where two future presidents, James Madison and James Monroe, were pitted against each other. Madison had originally intended to become a candidate for representative, but at the solicitation of friends had relinquished this desire and entered the senatorial race. The Virginia legislature, however, was too thoroughly opposed to the new government to allow itself to be represented by the state's chief exponent of the Constitution, and defeated him. Thus he was left free to pursue his original object, but the political enmity of the assembly still followed him. His district was made to consist of the counties of Amherst, Albemarle, Louisa, Culpeper, Spotsylvania, Goochland and Fluvanna, in addition to his home county of Orange.[81] His friends in the assembly endeavored to include the Federal county of Fauquier, which both from geographical position and habitual intercourse fell naturally into association with Orange, and to exclude Amherst and Goochland, two remote southern counties which were strongly Antifederal, but the effort was vain.[82] Writing to Jefferson of Henry's measures to defeat him for the Senate, Madison said: "He has taken equal pains in forming the Counties into districts for the election of Representatives to associate with Orange such as are most devoted to his politics, and most likely to be swayed by the prejudices excited against me."[83] The provision in regard to a candidate's residency within the district seemed also to be aimed at Madison. Many of his friends, believing the requirement unconstitutional, desired him to ignore

[81] Of the eight counties in the district, five had given an undivided vote in the convention against the acceptance of the Constitution, one had divided its vote, and two only, including Orange, had given an undivided vote for ratification. Rives' Madison, II. 654, note.

[82] Colonel Carrington to Madison, November 15, 1788. Rives' Madison, II. 654. Rives calls this the first case in which the device, later known by the name of gerrymandering, was put into operation.

[83] Writings of Madison, V. 313.

it and to appear as a candidate for an unquestionably Federal district, but he decided to stand in his home territory.

The Antifederal organization decided upon James Monroe as its candidate,[84] and the situation was simplified by the absence of any others from either party.[85] Both candidates spent the month of January electioneering—making public addresses, writing letters to friends and to the papers, and even appearing in joint debate.[86] The contest terminated with the election of Madison by a considerable majority. His home county gave him a practically unanimous vote, Culpeper, the critical county, over seventy per cent of its vote, and Spotsylvania, Monroe's home county, thirty-eight per cent.[87] In the other six districts of the state, the Federalists were also uniformly successful, even Kentucky returning a friend to the new government.[88]

[84] Monroe to Jefferson, February 15, 1789. Monroe's Writings, I. 199.

[85] Madison to Washington, January 14, 1789. Madison's Writings, V. 319.

[86] Two letters from Madison defining his position on the question of amendments, appeared in the Pennsylvania Packet of February 10, 1789. Rives, II. 656 gives an account of an open air debate between the competitors on a bitter cold day, from which Madison retired with a frost-bitten ear.

[87] Pennsylvania Packet, February 17, 1789.

The writer has not seen the returns from the other counties. Monroe wrote to Jefferson that Madison's total majority was about 300. Both candidates testified that their personal relations were not affected by the political contest. Monroe's Writings, I. 199.

[88] That is, the Federalists elected seven representatives and their opponents three. This is the classification which Madison gave to Jefferson in a letter dated March 29, 1789. Madison's Writings, V. 334.

It is frequently difficult to determine the precise political standing of public men in 1788-1789 who never became very prominent. The brevity of the reports of congressional debates, the questions between North and South, and the early formation of the Republican party, all render attempts at classification confusing. The Federalism of R. B. Lee, from

Delaware, entitled to only one representative, could not be districted for the election, even though the tendency of the state was toward such a system.[89] The election act had one striking feature, evidently designed to prevent one county from controlling the situation. Each qualified person was to have two votes, one of which was to be cast for a candidate not an inhabitant of the county in which the voter lived. The man receiving the highest number of votes was to be declared elected.[90] As a result of this provision, each county gave a full vote to one of its own number, and divided up the vote which went to outside candidates.[91] Whether this was spontaneous, or the result of pre-election political activity, can not be determined from the

the fourth Virginia district, is shown in letters written by him to Leven Powell. The John P. Branch Historical Papers of Randolph-Macon College, I. 219-223. Richmond, 1901—.

The situation of the several districts in the state, with the successful candidate in each, follows: First district, north-west part of Virginia, Alexander White; Second, Kentucky, John Brown; Third, south-west Virginia, A. Moore; Fourth, north-east section of state, R. B. Lee; Fifth, central and south central section, James Madison; Sixth, south section, east of third district, I. Coles; Seventh, north of York River to the Potomac River, John Page; Eighth, south-east section including the peninsula east of the Chesapeake Bay, J. Parker; Ninth, south section, next to the Sixth, T. Bland; Tenth, between the James and York Rivers, Samuel Griffin.

[89] This was shown in the choice of electors, for which the state was divided into three districts.

[90] Session Laws, October, 1788.

[91] Thus the electors of Newcastle united on Gunning Bedford, Jr., an inhabitant of that county. For second choice they favored Allen McLane and John Vining, both of Kent county. The voters of Kent united on their fellow inhabitant, John Vining, and for second choice they divided between Bedford and Joshua Clayton of Newcastle county. The returns for those two counties are given in the Pennsylvania Packet, January 15, 1789. The writer has not seen the returns from Sussex.

too meager records. Party politics, considered as such, played little part in the election, for all the principal candidates were Federal. The important point for a voter to ascertain of his candidate was place of habitation rather than party politics. Kent county, though not having a much larger population than Newcastle or Sussex, was able to get out a greater proportion of its voters and so elected its resident, John Vining.

The two other states of the original thirteen, North Carolina and Rhode Island, did not ratify the Constitution in time to send representatives to the first session of the first Congress, but North Carolina was in part of the second session and both were in the third. The second convention of the latter state ratified the Constitution November 21, 1789. The assembly which met immediately afterwards passed an act directing the manner of electing representatives, by which the State was divided into five districts or "divisions," each formed by the union of two of the ten superior court districts.[92] Each division was entitled to elect as its representative one of its inhabitants who must have resided within the division for the year just preceding. The election was to be held on the first Thursday and Friday in the following February (except in the western district, where it was to be a month later), and was to be conducted as were the annual elections of members of the general assembly. In case of a tie vote, the returning officers were to decide the election, or in the event of their failure, the decision was to be made by drawing lots as for the grand jury.

The election was held in accordance with this act, the successful candidates taking their seats in Congress in March and April. The divisions of the state with their successful candidates follow: the first or Roanoke division, formed by the superior court districts of Hillsborough and Halifax, returned J. B. Ashe, probably a Federalist; the second or Edenton division, formed by the districts of Edenton and Newbern, Hugh Wil-

[92] Laws of North Carolina, December 22, 1789.

liamson, a strong Federalist; the third or Cape Fear division, formed by the districts of Wilmington and Fayetteville, Timothy Bloodworth, a strong Antifederalist; the fourth or Yadkin division, formed by the districts of Salisbury and Morgan, John Steele, a Federalist; the fifth or western division, formed by the districts of Washington and Mero (the Tennessee country), John Sevier, ex-governor of the state of Franklin.

Rhode Island ratified the Constitution May 29, 1790. At the session of the general assembly held immediately afterward an act was passed providing for the choice of the single Rhode Island representative by the freemen assembled in town meetings on the last Tuesday of the following August.[93] In case no person received a majority, a second election was provided, the candidates at which were limited to those persons standing highest in the first election, the whole number of whose votes made a majority of all the votes cast. If no one secured a majority of all the votes cast at the second election, a third was planned to try the strength of the two most popular candidates at the second. A rather bitter contest ensued, the two principal candidates being Job Comstock and Benjamin Bourne.[94] Comstock was advocated chiefly because he was opposed to the slave trade. A second reason for selecting him was that he was a Friend and it was urged that some one of that faith should hold office. The person elected was to serve only until the following March, and Comstock's friends demanded that his abilities be given a trial for that length of time.[95] The chief argument in Bourne's favor was that he was a successful lawyer. The vote in Providence gave Bourne a majority of two hundred and eighty, and

[93] Rhode Island, Session Laws, June, 1790.

[94] Of the two important newspapers in Providence the Gazette and Country Journal apparently favored Bourne, and the United States Chronicle, Comstock. Bourne had worked and voted for the adoption of the Constitution, while Comstock had voted against it in the state convention. Staples, Rhode Island in the Continental Congress, pp. 672-673.

[95] United States Chronicle, August 26, 1790.

though outside of that city he did not run so well, he was elected with a total majority of two hundred and thirty-nine.[96]

Reviewing the provisions made by the thirteen states for this first election of representatives, the lack of uniformity is at once apparent. A rough division of five groups may be made. Four states, Pennsylvania, New Jersey, New Hampshire and Connecticut, adopted the general ticket system, but in nearly all other particulars their laws were different. Georgia and Maryland, while allowing the entire voting population to vote for the full congressional quota, required one representative to be chosen from each district. New York and South Carolina required just the reverse—the voters in each district choosing only one representative, who, however, might come from the state at large. Massachusetts, Virginia, and North Carolina, the fourth group adopted the district system, their laws varying in other respects. Delaware and Rhode Island, with their single representative, were untroubled by questions which disturbed other states, but enacted systems which had peculiarities of their own.

New Hampshire and Massachusetts required majorities to elect, while the other states only asked for pluralities. The time of elections varied in eleven different states from November 24, 1788, when South Carolina cast its ballot, to March 10, 1789, when New Jersey finished the election.[97] Only two states, Delaware and Maryland, elected on the same day and that was determined by the time for choosing presidential electors.

[96] Providence Journal, August 28, 1790. The detailed vote is not extant.

[97] The time of election of representatives in the different states was as follows:

South Carolina, November 24-25, 1788.
Pennsylvania, November 26, 1788.
New Hampshire, December 15, 1788.
Massachusetts, December 18, 1788.
Connecticut, December 22, 1788.
Delaware and Maryland, January 7, 1789.
Virginia, February 2, 1789.
Georgia, February 9, 1789.
New Jersey, February 11—March 10, 1789.
New York, March 3, 1789.

CHAPTER IV

PRESIDENTIAL ELECTORS

The Constitution was clear enough in saying that United States Senators should be chosen by the respective state legislatures, and that representatives should be chosen by the people. But a new and important question had reference to presidential electors. Should they be appointed by the legislature or elected by the general body of voters? If by the former, should it be by joint or concurrent ballot—a question also involved in the choice of senators. If by the latter, should it be by the district or by the general ticket system—an important question in the election of representatives. Congress had gone to its constitutional limit in fixing the time for the choice of electors, and the time for them to cast their votes.

A newspaper correspondent at Philadelphia, October 1, 1788, maintained that Congress had construed the Constitution to mean that the legislatures should make the appointment. "For if the people, as hath been asserted, are to choose the electors, is it possible that in the large states of Massachusetts, Virginia, etc., the returns can be made for the choice, notice given to the persons chosen, and the persons thus chosen have time to meet together in the short space of one month? No, it is impossible, and can only be remedied by the legislatures, who, in fact, are 'the States' making the choice."[1] This view was not shared uniformly throughout the Union, however, for the ten states which took part in the first presidential election were nearly evenly divided in actual practice. The two secondary questions, relating to a concurrent or joint ballot and to a general ticket or district sys-

[1] Edward Stanwood, A history of the presidency, p. 21. New York, 1904.

tem, were the excuse for elaborate constitutional debates in the various state assemblies, but were really decided by such other considerations as state politics, election habits or compromises over the relative importance of the upper and lower houses of assembly. These two questions will be further discussed in connection with state cases coming under them.

The first state to enact the necessary laws was Pennsylvania. The twelfth general assembly of that state met in its third session Sepember 2, 1788. On September 17 the action of Congress of the thirteenth was officially received, and the following day it was referred to a special committee with instructions to draft a bill if necessary.[2] On the twenty-third a bill was reported providing for the election of both United States representatives and presidential electors on the first Wednesday in January, 1789. One section of this bill specified that every qualified voter was to write the names of ten persons to serve as electors, upon a slip of paper. The ten receiving the highest number of votes were to assemble at Reading on the first Wednesday in February and cast their ballots for president and vice-president. When the bill came up for discussion the following day, attention was confined almost exclusively to the provisions in regard to representatives.[3] It seemed to be taken for granted that the choice of electors lay with the people. One speaker, indeed, declared that while the Constitution left the appointment of electors to the legislature or to the people, according as the former directed, yet in such a case the legislature ought not, in delicacy, to decide in its own favor. On the question of district versus general ticket elections, a long debate took place. But when the decision to elect representatives rested with the advocates of the general ticket system it was taken for granted that the choice of electors should be by the same plan. The editor of the Pennsylvania Packet wrote that when it was once decided to allow

[2] Minutes of the Assembly of Pennsylvania.

[3] Lloyd's Debates.

the people at large to choose electors, a new argument was furnished for the general ticket system. "For were we to go into district elections we must have ten districts for electors of presidents, and eight for the Federal representatives, which would oblige us to hold the elections on different days, at the expense of double cost and time, and with a repetition of the confusion that attends an election."[4] As a matter of fact, however, just before the passage of the bill on September 29, it was decided to hold the elections on separate days; for representatives on the fourth Wednesday in November, for electors on the first Wednesday in January. The bill was finally enacted October 4.

A method similar to the one just described in that the choice was left to the people, but different in that the district system prevailed, was followed in Delaware. That diminutive state had no excuse for the appointment of electors by the legislature, especially since that body had met in October, leaving ample time to make arrangements for a popular election. It was entitled to appoint three electors. Being already practically divided into three districts (as the state consisted of three counties) it was naturally suggested that each be allowed one elector. It was therefore enacted that an elector be chosen by the qualified voters of each county, such person to be an inhabitant of the county from which he was chosen.[5]

Maryland, although providing for popular choice of electors, differed in the details of her arrangements from both Pennsylvania and Delaware. Section VI of her act for carrying the government into operation provided[6] that every qualified person

[4] Pennsylvania Packet, September 27, 1788.

[5] Session Laws of Delaware, October, 1788.

[6] "An Act directing the time, places and manner of holding elections" etc. Session Laws, December 22, 1788.

Stanwood (on page 22) and Dougherty (page 282) are both mistaken in saying that the Delaware legislature chose the first electors in Delaware.

vote for eight electors, five from the western and three from the eastern shore. The five on the western shore and the three on the eastern having the greatest number of votes were to be declared elected. This was nothing less than dividing the state into two great districts and prescribing the number of electors from each, but allowing the whole body of voters to cast their ballots for the full number.

Of all the ten states, Virginia, it would seem, had the most reason for appointing electors by the legislature. The majority in that body was Antifederal and could have chosen men of its own political views, whereas a popular election might result otherwise, for it was well known that the state was much more Federal than the legislature.[7] And should the popular election be held by the district system, several if not a majority of Federal electors were sure to be returned. Again, if the counties lying far beyond the mountains had to hold their elections on the first Wednesday in January and send the returns to Richmond, how could electors of these frontier districts receive official notification in time to meet the other electors at some eastern point by the first Wednesday in February? In the face of these practical as well as political arguments, however, the choice of electors was left to the people,[8] and more than that, a complete district system was put into operation. As the state was entitled to twelve electors, it was therefore divided into that many districts.[9] Persons who were qualified to vote for assemblymen were allowed the suffrage at this election. The elector was to be "a

[7] Maryland Journal, December 12, 1788.

[8] Probably one reason why the election was referred to the people was because the legislature would not have been in regular session on January 7.

[9] Each of these districts was composed of two senatorial districts. "This mode, although unequal and unjust, was adopted on account of the shortness of time for promulgating the law." Maryland Journal, November 28, 1788.

discreet and proper person, being a free-holder and *bona fide* resident in such district for twelve months."[10]

The provisions for the appointment of electors thus far described left the choice simply and solely to the people. The alternative, or what was generally considered as such, was for the legislature to make the appointment. But two states, New Hampshire and Massachusetts, put into operation an intermediate system by which the legislature shared the privilege of appointment with the people. The general court of New Hampshire, by an act of November 12, 1788, provided for the election of both representatives and electors on the third Monday in December. The persons qualified to vote for the former, were to bring in also their ballots for five electors, the full number to which the state was entitled. Electors were to be inhabitants of the state who were not continental senators, representatives or persons holding offices of trust or profit under the United States. The votes were to be returned to the general court which was to be in session at the beginning of January, and the persons having a majority were on the first Wednesday in January to be duly declared elected. In case five persons or less should not be chosen by a majority, then the general court was to choose from double that number of candidates having the highest number of votes, as many as might be lacking.[11] Had the election resulted in five

[10] "An act for the appointment of electors to choose a President, pursuant to the constitution of government for the United States," passed November 17, 1788. Hening, XII. 648.

"Each elector chosen pursuant to this act, and failing to attend and vote for a president at the time and place herein directed, and moreover to send and certify the same in manner directed by the constitution of government, shall, except in cases of sickness or any other unavoidable accidents, forfeit and pay two hundred pounds, to be recovered by the solicitor general, to the use of the commonwealth, by action of debt, bill, plaint or information, in any court of record." Hening, XII. 651.

[11] "And in case it shall so happen, that the whole, or any part of the number of electors, are not chosen by the people, then the general court shall take a number of names out of the candidates who have the highest number of votes, equal to double the number of electors wanting, from which the senate and house shall, *in such way and manner as may be by them agreed on*, proceed to appoint the electors wanting."

persons receiving a majority, the legislature obviously would have had nothing to do but canvass the returns and declare the result—barely enough to meet the requirement that the appointment be made on the first Wednesday in January. But, as will be seen, no elector received a majority and it became the duty of the general court to choose the full list.

In Massachusetts the subject of electors was closely connected with that of representatives. For the election of the latter the state was divided into eight districts, each to choose one representative on December 18, 1788.[12] On the same day each district was to choose also two persons, inhabitants of the district, to be candidates for electors. From the two persons receiving the highest number of votes in each district, the general court in joint session on the first Wednesday in January, was to appoint one. In addition to the eight thus chosen, the general court was to appoint two electors at large.

Thus Massachusetts put into operation a district system while New Hampshire had a general ticket system. Further, it was not meant in Massachusetts that the system should be anything more nor less than a nomination by the voters, while the system in New Hampshire provided an actual election, subject to the condition that the persons so elected secure a majority. Finally, definite provision was made in Massachusetts that the action of the general court on the first Wednesday in January should be in joint session of the two houses, while the New Hampshire law made no provision on this point—an omission productive of trouble later.[13]

[12] Resolve for organizing the federal government, November 20, 1788.

[13] According to the N. H. constitution of 1784, the delegates to Congress were to be elected by the senate and house "in their separate branches." The president of the state was elected by popular vote, but if no person received a majority, the house was to elect two persons, out of the four highest, and the senate one from these two. The council (two members from the senate and three from the house), as well as the secretary, treasurer and commissary general, was to be chosen annually by joint ballot.

In three of the remaining four states, the appointment of electors was made by the legislature. Two, Georgia, and Connecticut, made no previous provisions by law for the appointment, but South Carolina, in the same act prescribing the manner of choosing representatives [14] provided that electors should be chosen by the legislature on the first Wednesday in January. In the fourth state, New Jersey, it was arranged [15] that the governor and council meet at Princeton on the required day, and choose six persons to be electors, "being freeholders and residents in the State."[16]

New York had ratified the Constitution, but owing to a deadlock between the upper and lower houses did not provide for the appointment of electors and so had nothing to do with Washington's first election. The legislature of that state met ordinarily in January, but the importance of giving prompt attention to the necessary arrangements for starting the new government caused it to be convened early in December, 1788. The senate in its address to the governor declared that the appointment of electors was a matter of such magnitude that, if sufficient time had intervened for a general election, it would rather

[14] Passed November 4, 1788.

[15] An Act for carrying into effect the Constitution of the United States, November 21, 1788.

[16] Stanwood, in his History of the Presidency, page 22, says that for this first election, the governors of five states, Connecticut, New Jersey, Delaware, South Carolina and Georgia, did not summon the legislature in time to provide for an election by the people. He is mistaken, however, for Delaware did hold a popular election for electors, while the legislatures of Connecticut, New Jersey and South Carolina were holding sessions in October and November of 1788 and could have provided for popular elections as well as Virginia and the other states.

Dougherty, in his Electoral system of the United States, page 282, falls into the same error. Stanwood's statement might possibly apply to Georgia, but certainly not to the other states.

have referred the choice to the suffrage of the people. To which the governor answered: "I regret that the legislature could not have been convened at so early a period as to have afforded time to have made and carried into effect the arrangements necessary for appointing electors in the manner which, it seems, you would have preferred. But, since this was impracticable, you will, I am persuaded, perceive the propriety of pursuing your principle, as far as circumstances will permit, and of adopting such mode of appointment *as shall appear most nearly to approach an election by the people.*"[17] It was thus understood at once that the choice was not to be referred to the people. By the last sentence of his message Governor Clinton apparently meant that the house of assembly, as it stood nearer to the people, should have more influence in appointing electors than the senate. This brought into prominence the respective politics of the two houses. A large Antifederal majority (Governor Clinton's party) controlled the assembly; the senate had a small Federal majority. If the appointment were made by joint ballot, eight Antifederal electors would be chosen, if by concurrent vote, probably four Federalists and four Antifederalists.[18] This was the situation which produced a struggle attracting attention throughout the Union.

The senate took first action by passing a bill on December 18, which provided that each house choose four electors.[19] On the twenty-second the assembly rejected the senate bill without debate, but passed instead a sort of omnibus bill of its own, providing for the choice not only of electors, but also of senators and representatives. Senators and electors were to be chosen as were the New York members of the Continental Congress,[20]

[17] Massachusetts Centinel, January 14, 1789.

[18] Dougherty, in his Electoral system of the United States, page 20, is mistaken in saying that New York was entitled to ten electors.

[19] Pennsylvania Packet, December 25, 1788, et seq.

[20] Section 30 of the state constitution.

—each house was to nominate separately the number of persons needed, and if, on comparing the lists, the same men were named by both houses, they were to be declared elected. In case no electors were thus concurrently named, the election was to proceed by joint ballot, the office going to the persons receiving the highest number of votes. The senate passed this bill, but amended it so as to secure the appointment of senators and electors by concurrent rather than joint vote. The assembly disagreed with the amendments, and on January 5, 1789, in accordance with provisions governing such cases, the two houses met in "conference" to discuss the senate amendment.[21] But neither house would recede from its position and the bill was lost.

Several days later another bill was introduced into the lower house and passed that body January 27, twenty days after the choice of electors should have been made, according to the resolves of Congress. It seemed that the assembly majority still hoped the state would take part in the first election.[22] The mode of appointment provided in the new bill was exactly similar to that which had been rejected after the conference of January 5, and the fate of the bill was the same. It was amended by the senate, a conference was held, neither side would recede, and the bill was lost.

On February 4, the day fixed by Congress as the time for electors to meet and vote, Mr. B. Livingston, in the assembly, moved that electors be chosen by concurrent resolution. The

[21] See the chapter on the election of senators where these arguments are given in detail.

[22] Alexander Hamilton to Sedgwick, January 29, 1789. Hamilton's Works, IX. 456. Speaking of the day for the appointment of electors having gone by with no action on the part of the assembly, he said: "I am not sorry, as the most we could hope would be to balance accounts and do no harm. The antifederalists incline to an appointment notwithstanding, but I discourage it with the federalists."

joint ballot plan was promptly substituted by the usual majority, and the whole resolution as promptly rejected by the senate. The upper house then sent to the lower the proposition that each body choose four persons to serve as electors, but it met with the usual rejection. As a last effort, Mr. Watts, in the assembly, introduced a resolution that a committee to consist of five members from each house, be appointed to select eight proper persons to be approved as electors by the two houses. This last proposition was lost by a strict party vote.[23] If any one of the attempts which were made after January 7 to appoint electors in New York had been successful, it would surely not have been regarded as legal. Just what action Congress would have taken when the electoral vote came to be counted under these circumstances it would be interesting to know. But at that particular crisis, it was probably fortunate that it did not become necessary to throw out the whole electoral vote of a large state.

Turning from this diversity of legislation to the political conditions preceding the actual election of January 7, 1789, a rather chaotic situation discloses itself. Politics as well as government was in a transitional stage. The struggle of the past year over the adoption of the Constitution had drawn a sharp line between its supporters and opponents, but with the victory of the former new questions were coming up to cause a different political alignment. For the ensuing year, three parties were rather vaguely outlined, namely, the supporters of the Constitution as it stood, the advocates of a new convention to amend or recast the Constitution, and the advocates of amendments to be proposed by Congress. The last party, indeed, was a compromise party made up in part of former opponents to the Constitution, such as Edmund Randolph, and in part of former supporters forced into an advanced position to carry the election, as was the case of Madison. It was the program of the radical party to secure control of the government in the fall and winter

[23] Pennsylvania Packet, February 16, 1789.

elections and to force Congress into calling a new convention. It was even rumored that, contrary to the generally expressed desire of making Washington president, the Antifederalists of the three large states of New York, Pennsylvania and Virginia would support Patrick Henry for chief executive and Governor Clinton for vice-president. Such reports called forth warm expostulations [24] and brought on sharp party conflicts at various places.

The actual result of the election showed that the danger was not so great as the Federalists had feared. New York, a stronghold of the opposition, as we have seen, because of the quarrel in the legislature took no part in the presidential election. Of the ratifying states, Virginia would probably have appointed the electors most to be feared by the friends of the new government had the appointment been made by the legislature. But with the choice by popular election, the Federalists had more than an even chance, and after an active canvass elected nine of the twelve electors, Patrick Henry being one of the three successful Antifederalists. According to Madison, the sole object of the election, in the eyes of the mass of the people, was the choice of a president, little attention being paid to the second office.[25] Thus in Amherst county, Colonel Cabell, the Antifederalist candidate, received a unanimous vote simply because he had made a previous declaration which satisfied the Federal party as to the disposition of his vote for president. That the district of which Amherst was a part gave a small majority to General Stevens, the Federal candidate, was due solely to a similar coalition in another county.[26]

In Pennsylvania, where the general ticket system had been adopted, two complete electoral tickets were put forth, one by the Federal convention at Lancaster, November 3, and the other

[24] New Jersey Journal, January 14, 1789.

[25] Madison to Washington, January 14, 1789. Writings of Madison V. 318.

[26] Ibid.

as a result probably of the Antifederal convention in Harrisburg September 3.[27] The election of representatives came several weeks earlier than that for electors, unfortunately for the latter, for one result was a perceptible decrease in interest and a considerably smaller vote. From Fayette county, for instance, came the disheartening news, "no election has been held in this county for the election of electors. The number of persons who attended on that day was not sufficient to have filled the necessary offices of such an election."[28] A writer in the Pennsylvania Packet[29] complained bitterly of the laxity of the returning officers, and asked if Pennsylvania, like New York, was to look on as a silent spectator, and be made the scoff of the Union because a few Antifederal county officers trampled with impunity upon the laws. The Supreme Executive Council had taken steps to prevent such a defeat of the law by employing two express riders to bring the returns from the ten counties situated furthest away.[30] Even then it was not until Tuesday, February 3, that the returns from the several counties were inspected by the Council, and the names of the ten successful persons were proclaimed.[31] These men had all been elected from the Federal ticket.[32]

In Maryland the election of representatives and electors came on the same day, with the chief interest centering in the

[27] For a description of these conventions, see J. S. Walton, Nominating conventions in Pennsylvania, American Historical Review, II. 262 et seq.

[28] Pennsylvania Archives, XI. 535.

[29] February 2, 1789.

[30] Colonial Records, XV. 633, 634, 637. Pennsylvania Archives, XI. 430.

[31] Colonial Records, XV. 655.

[32] Pennsylvania Packet, January, 1789. For the election of January 7, only the vote cast for the Federal candidates was seen by the writer, but this was much smaller than the corresponding Federal vote for representatives in the previous November. It is probable that the Antifederalists were discouraged by the result of the first election, and cast even a comparatively smaller vote than the Federalists at the election of January 7.

former. Both parties had put forth complete electoral tickets. That of the Federalists was formed in the latter part of December by a legislative caucus;[33] that of their opponents was announced as the work of a number of gentlemen, "zealous guardians of the rights of the people."[34] Two of the Federal candidates were included in the Antifederal ticket, placed there, the Federalists charged, "in the hope that their deserved popularity in their several counties, would draw to them the votes which would otherwise be given to members of the federal ticket, by which means they expect to divide the federal interest and thereby increase the chances in favor of the antifederalists."[35] The returns from the election came in rapidly and showed that the entire Federal ticket was elected by majorities ranging from two thousand to five thousand.[36]

From the little available material on the political conditions in Delaware it seems that both campaign and election passed off very quietly, with little or no contest. Indeed, in Kent county, John Banning was chosen elector by a unanimous vote, and in Newcastle, the vote for G. Bedford was practically so.[37]

Turning to Massachusetts, with its system of district nomination by popular vote, one finds no evidence of any active canvass in behalf of electoral candidates. As in Maryland, the election of representatives was absorbing all the attention. Moreover, there was no extra-legal machinery by which the number of candidates could be reduced, and this made the striking feature of the election, as compared with the middle states, the large number of persons who received votes. This is well illustrated by a

[33] See page 47.

[34] Maryland Journal, December 26, 1788.

[35] Maryland Journal, December 30, 1788.

[36] Ibid., January 23, 1789.

[37] Pennsylvania Packet, January 15, 1789.

The writer was unable to discover any complete files of Delaware newspapers for this period.

news item from Worcester, in which it was said, "We learn that the inhabitants of this county were so well united in the choice of electors of president and vice-president of the United States that there were *only* between forty and fifty candidates voted for. *"Behold how good and how pleasant it is for brethren to dwell together in unity."*[38] From these large lists the names of the two persons standing highest in each district were returned to the general court, and on January 7, in accordance with the previous arrangements, the two houses met in joint session and appointed one elector from each district and two electors at large.[39] It is needless to say that all were Federal.

In New Hampshire, as in Massachusetts, the vote was scattering, and as no one person received a majority, the election of the complete list devolved upon the legislature.[40] But sufficient provision had not been made for such a contingency. Just as the legislature was ready to proceed to the election on January 7, the question suddenly arose as to whether it should be done in joint session or by concurrent vote, and a disagreement followed which lasted almost until midnight. From all accounts,

[38] Ibid., February 7, 1789.

[39] Pennsylvania Packet, January 20, 22, 1789.

The resolve for putting the general government into operation had provided that the general court appoint two electors at large "not voted for by the several districts." But it was found that over 200 persons had received votes in the district nominations, and the legislature felt so restricted that it passed a resolve on January 6, that any citizen of the state not appointed an elector from one of the districts, and not otherwise disqualified should be considered as eligible for an elector at large.

[40] The total vote cast was 20142. State records of New Hampshire, XXI. 258.

As each voter was authorized to vote for five persons, there were evidently 4029 persons who voted, and the necessary majority would be 2015. General Bellows, who received the highest popular vote, fell short of the necessary majority by over 250 votes, 1759 being given him.

contrary to the New York situation, no political question seems to have been involved. It was a disagreement on purely constitutional grounds, a question of rights and privileges as between the two houses. The senate insisted that the appointment was a legislative action, and that the upper house had its constitutional right of a negative upon the action of the lower. The latter replied with equal insistence that the senate had no right to control the choice of the house, and that the appointment should be effected by joint ballot. "The contest terminated in the lower branch's acceding to the proposal of the upper, and the choice was happily effected—the house 'at the same time solemnly protesting against the said mode of choice, and declaring that in the opinion of this house, the present mode of appointing electors ought not to be considered as establishing a precedent, or drawn into example, or insisted upon as a rule, in any future appointment of electors.' What rendered the above circumstance more delicate, and greatly heightened the anxiety of the spectators, was the knowledge that if a compromise did not take place before the close of the day, New Hampshire would lose the honor of giving her suffrages for a president of the United States."[41] It is worthy of remark that though the legislature could have chosen any five from the ten persons who had received the greatest number of votes in the popular election, it disregarded this prerogative and simply named the five who stood highest.

For the other four states which appointed electors, the records are very meager and show little of interest. The Connecticut general assembly, on the specified day,[42] appointed the full list—all being Federalists. The governor and council of New Jersey, by proclamation dated January 7, named the six electors for that State[43] The Georgia legislature consisted of

[41] Freeman's Journal, February 4, 1789.

[42] Pennsylvania Packet, January 23, 27, 1789.

[43] New Jersey Journal and Political Intelligencer, January 14, 1789.

but one house, and the appointment was a simple matter.[44] The legislature of South Carolina[45] had been summoned to meet on January 5, but it was January 7 before a quorum of the house was present, and January 12 before a quorum of the senate appeared. On Wednesday, January 7, however, all of the senators present (being ten) met with the house and the electors were chosen by joint ballot.[46] Although done without a quorum of the senate, the election was legal and in accordance with the act of the previous November. The fourth section of that act declared that the appointment should be by such members of the legislature as should attend on the first Wednesday in January.

Notices of the appointment of electors in the different states had not ceased appearing in the newspapers before accounts of the casting of electoral votes on February 4 began to come in. It was reported that the Massachusetts electors proceeded to business "without a single debate on the subject,"[47] and the same comment would probably apply to the proceedings in the nine other states. Only ten of the twelve Virginia electors voted,[48] and of the eight for Maryland, only six voted. In the latter state, it was explained, "Mr. Plater was confined by the gout, and Mr. Richard prevented from attending by the ice in the river and bay."[49] The Pennsylvania electors, after going

[44] Pennsylvania Packet, February 23, 1789.

[45] November 4, 1788. "And be it further enacted by the authority aforesaid, That Electors of a President of the U. S. shall be appointed by the legislature of this state on the first Wednesday in January next, or by such persons as shall be returned members thereof, and shall attend on that day . . . . . "

[46] Independent Gazetteer, February 16, 1789.

[47] Pennsylvania Packet, February 16, 1789.

[48] Ibid. The two who did not vote were Samuel Kello from the south-eastern part of the state, and Warner Lewis from the eastern part of the state. No explanation of their absence has been seen.

[49] Ibid., February 21, 1789.

through the routine of casting their ballots, repaired to the Federal Inn, where, it was reported, they dined with great hilarity.[50] In nearly every case the result of the ballot was soon made known. Thus from Georgia came the news that after the ballots were counted "the electors politely acknowledged that General Washington had the unanimous vote of the state." [51]

Summing up the provisions made by the several states for the appointment of electors in 1788-1789, it is found that in four states the choice was made entirely by the qualified voters, in three by the legislatures, in two by the voters indirectly, and in one by the governor and council.[52] A classification politically of the seventy-three electors chosen by the ten states which participated in the election is impossible to make, but it can at least be said that probably seventy were "friends of the Constitution." The list of persons for whom votes were cast for the vice-presidency shows only one avowed Antifederalist, George Clinton, of New York, who received the vote of the three Antifederalists elected in Virginia.

[50] Ibid., February 7, 1789.

[51] Ibid., March 17, 1789.

[52] Dougherty, in his Electoral system of the United States, page 303, gives an interesting though slightly inaccurate table, showing the lack of uniformity and the frequent changes in the modes of appointment of electors in the various states prior to 1832.

CHAPTER V

ADJUSTMENT OF VARIOUS FEDERAL AND STATE RELATIONS IN 1789

Immediately after the organization of the new Federal government a general constitutional and legal re-adjustment took place throughout the Union. The rather unstable equilibrium in the relations between state and national governments, prevailing under the Articles of Confederation, had been swept away by the Constitution, which clashed with, and rendered obsolete many of the provisions of the state constitutions and laws. For this reason the effort to bring state and nation into proper relations again often took the form of a movement to re-codify the whole system of state laws, or to substitute new and revised state constitutions.

Some states were loath to admit, however, that the new order did render obsolete conflicting state provisions. In some quarters it was rather regarded as an act of grace for the legislature to revise its laws so as not to "interfere" with the execution of federal statutes. Proposed revisions encountered legislative opposition, an opposition which hindered and in some cases entirely prevented any thing like a thorough overhauling of state laws and constitutions. In these cases the friends of revision were fortunate if they obtained amendment or repeal of only certain specific acts plainly incompatible with federal enactments.

Of such conflicting nature were the state revenue laws. Previous to the adoption of the Federal Constitution, each state had established its own commercial system, levying import duties and enforcing shipping regulations. Each pursued its own policy, regardless of the effect upon neighboring states, and the result, bewildering to foreign importers, and ruinous to the prosperity of the country, was a medley of contradictory laws.

Of the thirteen states, Delaware and New Jersey were the only two which allowed free trade. The former had not levied any duties at all since the separation from England, while the latter had abolished her system by act of June 11, 1783.[1] All the other eleven states had enacted tariff laws varying from low revenue to high protective systems. Thus the Massachusetts act of November, 1786, was "to raise a public revenue by impost;"[2] the Virginia act of October, 1782, "for establishing a permanent revenue;"[3] the North Carolina act of November, 1784, "in aid of public finances."[4] On the other hand, the preamble to the New Hampshire act of March, 1786, declared that it was meant not only to produce a revenue but to encourage manufacturing as well,[5] while the Pennsylvania act of September 20, 1785, was passed as a protective measure pure and simple.[6] It recognized that goods might be imported more cheaply than manufactured in Pennsylvania, but this it declared was poor policy, fatal to home industries.

In retaliation for the royal proclamation of July 2, 1783, confining the West Indian trade to British shipping, several of the states adopted a special discriminating schedule against Great Britain. Maryland levied a duty of two per cent ad valorem, over

[1] New Jersey Session Laws, 1783, Ch. 27. This was the act authorizing on the part of New Jersey the revenue amendment to the Articles of Confederation, proposed by Congress April 12, 1783. It recited that it was not to go into effect until all the other states in the Union had passed a similar measure, and enacted "that in the meantime all the Ports in this State be, and they are hereby declared free and open for the Importation and Exportation of any Goods, Wares and Merchandise whatsoever, clear of all Duties, Customs or Impositions, of any Species or Denomination."

[2] Laws and Resolves of Massachusetts, November 17, 1786.

[3] Hening, XI. 112.

[4] Laws of North Carolina, 1779-1788, p. 549.

[5] Session Laws of New Hampshire.

[6] Session Laws of Pennsylvania.

and above all other specific and ad valorem duties, on goods imported by British subjects,[7] while Rhode Island levied a duty of seven and one-half per cent ad valorem above the ordinary rates on such importations.[8] In South Carolina, where specific duties were levied in most cases, the schedule for British importers was from one-third to two-thirds higher than the schedule for other foreign importers.[9]

In a number of cases the express provision was made that the duties levied were not to apply to goods or merchandise produced by the sister states, but in other cases two schedules were adopted, one applying to foreign the other to domestic shipping. Rhode Island offered a reciprocity plan to her neighbors. By act of June, 1783,[10] she levied a two per cent ad valorem duty on all goods imported from foreign countries. But if imported by citizens of other states into their native state, and then reshipped to Rhode Island, such goods were to be exempt from the impost, provided a duty of two per cent had been paid in the other state upon arrival from the foreign country, and provided the other state gave reciprocal privileges to citizens of Rhode Island. The schedules of the different states in nearly every case included a number of articles upon which specific duties were levied, with an ad valorem duty upon all remaining imports. Massachusetts, the exception, had adopted a pure ad valorem system.

In addition to the duties on imports eight of the states had placed in operation previous to 1788 some system of tonnage duties, varying from four pence to six shillings per ton. Discrimination was usually made in favor of American bottoms, though Georgia levied a flat rate of two shillings per ton, in ad-

[7] Session Laws of Maryland, 1783, 1784.

[8] Session Laws of Rhode Island, May, 1785.

[9] Statutes of South Carolina, Act of March 27, 1787.

[10] Session Laws of Rhode Island, 1783.

dition to one shilling per ton for the support of a seamen's hospital.[11]

It seemed to have been well understood in the autumn of 1788 that all of these state laws must soon come to an end, but it was a debated question whether such laws should be specifically repealed by the legislatures, or whether they should be allowed simply to be superseded by the action of the new government. If the latter, would they cease to be operative on the fourth of March, or would they continue in force until a new general impost system went into operation? According to the Constitution, Congress was to have power to levy duties and imposts, though it could not tax exports; on the other hand the states were forbidden, without consent of Congress, to lay any duties on imports, except those absolutely necessary for the execution of the inspection laws, or to levy any tonnage duties. This apparently bore out the contention that the state impost laws would come to an end, unless previously repealed by the legislatures, on the fourth of the following March. "A kind of interregnum," wrote a newspaper correspondent who accepted this interpretation, "will take place on the first Wednesday in March, with respect to duties on imports; as on that day the power of an individual state to collect such duties, 'except what may be absolutely necessary for executing its inspection laws,' will cease; and it must require some time for Congress, after having made the arrangements necessary for proceeding to business, to form and put in execution a system of revenue. This will be rather an unfavorable circumstance for public credit; but individuals, who may be so fortunate as to make importations during that interval of *free trade,* will no doubt make a considerable saving by it."[12]

[11] Act of February 1, 1789.

[12] Independent Gazetteer, February 27, 1789. Similarly a writer in the Virginia Independent Chronicle, December 24, 1788, on the subject of the public debt of Virginia, took it for granted that the impost of the state would cease after March 4, 1789.

The same view was taken by the Pennsylvania Assembly committee of ways and means. Estimating the revenues and expenditures for the year 1789, it reported, "as the government of the United States have, by their Constitution, the exclusive right of levying imposts, of course that part of the revenue of Pennsylvania will immediately cease."[13] The impost had produced in 1788 £52,000, which, added to £3,200 produced by the duty on foreign and domestic tonnage made a reduction of the revenue to the amount of £55,200 for the year 1789.

In Virginia the opinion was expressed in the summer of 1788 that the state impost laws had been annulled the moment the Constitution was ratified. Several prominent and influential shippers of Accomac County, alleged Antifederalists, insisted that so much of the law as required vessels trading between the states to pay duties was totally abrogated by the new Constitution, and threats were made against any officer who should attempt to enforce that provision of the state act. In this dilemma, a naval officer wrote to George Corbin, the Attorney-General of the state, asking specifically whether or not the new Constitution annulled the provision of the state law in question. Corbin replied as specifically: "I am of opinion it does, being now the supreme Law of the Land."[14] In the face of this opinion the naval officer could not enforce the law but at once appealed from the decision of Corbin to Governor Randolph. The latter turned the question over to the general assembly, which met soon afterward. It apparently decided that the state law would be in force until the following March. Its general attitude is indicated in a letter written by Monroe to Madison, November 22, 1788. "It is generally agreed," he said, "to make no other alteration in the revenue system than by such change in the appropriation as will supply the defect of the impost wh. will belong to the U. S. after March. Whether the impost system of the state shall cease then, or con-

[13] Minutes of the Assembly of Pennsylvania, February 17, 1789.

[14] Calendar of Virginia State Papers, IV. 470, 500.

tinue until contrary provisions are made, seems to be a doubtful question. An apprehension that other states may lay theirs aside and open their ports free from duty in the interval, has weight on the minds of some and disposes them for a similar measure, especially as they suppose the amt. will belong to the U. S., but I rather believe ours will be continued until Congress directs otherwise, let the revenue accrue to whom it may."[15] Before the assembly adjourned it passed "An Act concerning certain public establishments,"[16] the first article of which recited that the operation of the government of the United States would render unnecessary several public establishments which existed under the laws of the state. Therefore it was provided "that so soon as it shall be notified to the executive by Congress, that measures have been by them taken concerning duties or imposts, all laws concerning naval officers, collectors of duties and searchers, and their salaries, and concerning duties and imposts of every denomination whatsoever, shall cease and determine; except the duty of six shillings per hogshead on tobacco exported, reserved for inspection duties." Upon receiving notification of such action by Congress, the Governor was to announce it by proclamation, the revenue officers were to balance and close their accounts, and the revenue cutters were to be discontinued and sold.

The thing of which the Virginia assemblymen were apprehensive, according to Monroe's letter, actually occurred in Connecticut. In January, 1789, the general assembly of that state passed an act by which all laws, "so far as they relate to the levying and collecting a Duty on Articles imported into this State, by Land or Water, shall from and after the first Day of February next, as relative to Articles thereafter imported, cease and determine."[17] Evidently then, Connecticut had free trade

[15] Writings of Monroe, I. 197.

[16] Hening, XII. 779.

[17] Acts and Laws of Connecticut, p. 377.

from the first of February, 1789, to the time in August when the national tariff law went into effect.

The Georgia assembly apparently took the ground that revenues arising under state laws accrued to the state as long as the law was in force, and that it required special action of the legislature to repeal such laws. By section three of an act of February 1, 1789, amendatory of a previous revenue law, it was provided: "This act shall be in force and virtue immediately from the passing of the same until the United States in Congress assembled shall by their act order otherwise, and no longer."[18]

While the Pennsylvania assembly did not specifically repeal the state impost laws, it was recognized, in an act of March 27, 1789, relative to the monetary engagements of the state, that an act of Congress would soon displace the state law.[19] The report of the committee of ways and means of the previous February 17, that the revenue arising from the state impost would immediately cease (see above), was known by this time to have been partially incorrect, for such revenue was still coming into the treasury of that state.

Massachusetts was the last state to pass any repealing provisions before the Federal statute went into effect. Late in June the general court enacted that the state impost law should be annulled at the time the act or law that should be made by Congress, for the purpose of raising a public revenue by impost, should begin to operate.[20] But in order to prevent any misunderstanding, a resolve was passed to continue in office the impost collectors until further orders.[21]

At the time of the passage of this Massachusetts repealing act, Congress had almost completed the formation of a general

[18] Iredell's Laws of Georgia, p. 383.

[19] Session Laws of Pennsylvania.

[20] Laws and Resolves of Massachusetts, 1788-1789, p. 415. Act of June 25, 1789.

[21] Massachusetts Centinel, June 27, 1789.

tariff system for the new government. The creation and execution of a scheme for producing a sufficient national revenue had invoked the earliest attention of the national Legislature, and as soon as the organization of the two houses was completed, this important subject was submitted to the consideration of the House of Representatives.[22] On April 8, in Committee of the Whole on the State of the Union, Madison introduced the subject by proposing that, in order to supply immediate financial needs, the recommendations by Congress in 1783 for establishing a national revenue be taken as the basis of a temporary system, leaving a permanent system to be worked out later. This did not meet the approval of the majority of the members of Congress, and after a delay of nearly four months a fairly complete and permanent system, consisting of three separate measures, was evolved.[23]

The last thing necessary to be done before this series of revenue laws could go into operation was the appointment of the various revenue officials to enforce the tariff regulations and make the actual collections at the ports. An army of office-seekers had been besieging Washington by correspondence and personal interview even as early as the previous autumn, but he had repeatedly declared that he would enter his work free from promises or engagements of any kind.[24] There were certain guiding principles which he necessarily followed in making his appointments.[25] He probably shared in a prevailing sentiment of that time that a man

[22] It is not the intention to give a complete account of the action of Congress in the formation of this first tariff act under the Constitution.

[23] An act for laying a duty on Goods, Wares and Merchandises imported into the United States, An Act imposing duties on Tonnage, An Act to regulate the Collection of the Duties . . . . . Statutes at Large, I. 24, 27, 29.

[24] Writings of Washington, Ford's Edition, IX. 349.

[25] See on this point, Office-seeking during Washington's administration, by G. Hunt, American Historical Review, I. 270-283.

had a property right in the retention of his office. This is well illustrated in a letter he wrote to Benjamin Harrison of Virginia. Colonel Parker had resigned his position as naval officer of Norfolk in order to take his seat in Congress, and the Council had chosen William Lindsay to succeed him. In the meantime Harrison applied to Washington for the office as soon as a Federal law should commence operation, and in reply Washington said, in part: "I wish you had pursued the policy which the gentlemen who now occupies it [the office] has done, of obtaining the appointment from the executive of this State. Although that gentleman was an officer, yet he is quite unknown to me, and therefore I cannot speak at all upon the ground of comparative claims of personal merit. I conceive, however, it will be found no pleasant thing, possibly very much the reverse, to displace one man under these circumstances of actual occupancy, merely to make room for another, however considerable his abilities, or unimpeached his integrity may appear to the public eye."[26]

The list of appointments was received by the Senate on August 3. A majority on the list had been in service under the state governments and formed exactly what was needed to carry out the new regulations, a trained body of officials. Within the next two days the Senate approved nearly all the appointees, delaying action upon three for want of more information, and flatly rejecting only one, Benjamin Fishbourn of Savannah. For the last the President promptly supplied a substitute.[27]

It was obviously impossible for the impost law to go into operation on the day prescribed in the act, August 1. But beginning with the organization of the New York custom house on August 5, the national system was extended as rapidly as news

[26] Writings of Washington, XI. 367. Lindsay was later continued by Washington.

[27] Journal of the Executive Proceedings of the Senate, I. 9 et seq. The President defended Fishbourn vigorously, giving reasons for his appointment.

could be received of the appointments, the time varying from the fifth to the last of August.[28] In the interval, from the beginning of the month to the time when the notice was received in the respective states, several importations took place upon which in some cases duties were paid under the state laws while in others none at all were paid. The question arose as to whether the United States, having no officers to make the collections at the time, could collect later. Hamilton, placed at the head of the Treasury Department in September, believed it to be a clear point that the duties on all goods imported after August 1, accrued as debts to the Federal government, the regulations prescribed by the collection law for securing the payments being merely auxiliary guards, not essential pre-conditions. Accordingly, not feeling at liberty to waive the claims for such duties, he instituted proceedings some months later, with a view to a legal decision.[29] At the same time he suggested to Congress the advisability of relinquishing these claims. It had not been expected by importers that the payment of duties during the transitional period would be demanded. The claim could be enforced only after favorable legal decisions in nearly every specific case, a proceeding which generally would be regarded as quite rigorous. Furthermore, in some cases, actual injury would result if the claims were pressed. For instance, merchants had sold their goods without

[28] A short report by Hamilton dated March 4, 1790, containing an abstract of the net proceeds for the duties on imports and tonnage to December 31, 1789, gives the time at which the law went into operation in each of the eleven states. According to this, the collections began in New Jersey and Delaware August 1 (plainly a mistake, as the appointments were not sent to the Senate until August 3), in New York, August 5, in Maryland, Pennsylvania and Massachusetts, August 10, in New Hampshire and Connecticut, August 11, in Virginia, August 17, in Georgia, August 22, and in South Carolina, August 31.

[29] Report of Hamilton, April 23, 1790, On the Operations of the Act laying Duties on Imports.

reference in the price to the duty; agents had settled accounts and paid over the proceeds of goods to their principals; and duties had been paid in some cases under state establishments. Finally, even if the justice and legality of the claims were established, it would still be difficult to determine the exact sums due on importations which had occurred several months before the claims were presented.

Congress took no action on the Secretary's recommendation, but these demands seem never to have been pressed. The difficulties were evidently too great, and the compensation too slight to carry to a judicial decision so unpopular a claim. At most the returns would not have exceeded a few hundred dollars—far too small a matter for which to risk the good will of the importers at the very commencement of the new system.[30]

There were other questions which caused considerable vexation to the merchants and which the states themselves had to settle. Two such questions came before the Supreme Executive Council of Pennsylvania for decision. On August 4, the state collector, Sharp Delany, laid before the Council a statement of the various limitation provisions in the impost and tonnage acts passed by the assembly since 1783. It appeared that some of the acts were without limitations, while some were limited "until that part of the resolve of Congress of April 18, 1783, be acceded to by each and every of the thirteen United States, and from thence to the End of the next Sitting of the Assembly and no longer"[31]—a condition never fulfilled. The collector now wished

[30] In New Hampshire the revenue from the imposts went into the state treasury until August 11, the collector being allowed ten per cent of the duties to that date. New Hampshire State Papers, XXI. 735. Had Hamilton pressed the United States government claims, petitions would have been presented to the state government for rebate, but no such petitions appear to have been made.

[31] Act of September 25, 1783. Session laws of Pennsylvania. See also act of September 20, 1785.

for directions as to how far these acts were superseded by the laws of the United States, though at the same time he called attention to the fact that should the state laws remain in force, there would be no benefit to the state treasury, for according to the new Constitution the proceeds of the collection would go into the treasury of the United States. But admitting that the state laws were superseded by the Federal law, there was a second matter upon which the collector was not sure of his position. The state laws had provided that if goods upon which duties had beeen paid should be re-exported within a certain time and under certain conditions, the whole of the duty would be returned. The merchants of Philadelphia had imported goods before the first of August upon which they had paid state duties, and, in the course of their business were daily exporting such goods after the first of August and demanding drawbacks. The question was, under these circumstances were they entitled to drawbacks?[32]

These questions were at once referred by the Council to a special committee with instructions to consult the judges of the Supreme Court and the attorney general.[33] Four days later the committee reported the following opinion from the judicial officers: "In answer to the first question, we conceive that all the acts and parts of acts of Assembly of the State of Pennsylvania, so far as they authorize or require imposts or duties to be paid to the use of the said commonwealth, upon goods, wares and merchandize imported within the said State, have ceased to have any legal operation or binding force.

"To the second question, as the authority and powers of the Collector and Naval Officer of the State of Pennsylvania have ceased with respect to any future act to be done by them, as such it appears to us, that no drawback or return of the duties paid, or secured to be paid, can be made to the merchants or persons who may propose to export the goods, etc., agreeably to the pro-

[32] Pennsylvania Archives, XI. 597.

[33] Colonial Records of Pennsylvania, XVI. 124.

visions made by the said acts of Assembly, without the aid of the legislature."[34]

This opinion was accepted and concurred in by the Council, and sent to Sharp Delany as an answer to his questions. It was satisfactory to the merchants in so far as state duties were concerned, but not in regard to drawbacks, and so, taking the hint from the judges' answer that the legislature might be able to offer assistance, they petitioned the assembly a few days later for relief. After considerable opposition, favorable action was taken by the close vote of twenty-five to twenty-three. Delany was declared to be state collector still on all goods imported before August 1 and as such was bound to account for all duties or bonds for duties received before that time, and to pay drawbacks on any goods exported which had been imported previous to August 1.[35]

In Virginia Governor Beverley Randolph issued a proclamation July 21, commanding the state revenue officers to cease the exercise of their powers from and after the first of the following August. The books and papers of the local officers were to be sent to Richmond for preservation. At least one collector however, Charles Lee of Alexandria, interpreted this not to include bonds which he held against merchants for duties on goods imported before August 1. He decided to retain such bonds and make the collections himself as they fell due after August 1, for, as he wrote the governor, by so doing he would receive a commission of one per cent, the merchants would pay the bonds more conveniently there than at Richmond, and the duties would be received at the state treasury more promptly.[36] This was evidently satisfactory to everyone concerned.

As compared with the lax enforcement of the various state laws, the strict observance required of the Federal law gave

[34] Colonial Records of Pennsylvania, XVI. 128, 129.

[35] Session Laws of Pennsylvania, September 29, 1789.

[36] Calendar of Virginia State Papers, V. 18.

an air of rigor to the new system. A good example of this is furnished by contrasting the different policies pursued in regard to the payment of bonds. Under the old system when bonds became due, the time of payment was frequently extended, or partial payments received, at the convenience of the debtor. But under the new system this was changed. Shortly after taking office, Hamilton sent out a circular letter to the revenue officers directing them to immediately put in suit bonds which were not paid as they fell due. On this point, he wrote, "the most exact punctuality will be considered as indispensable."[37] He regarded this strictness as not only necessary to the public business, but as also eventually most convenient to importers, for, according to the act to regulate the collection of duties, no person against whom there was an unsatisfied bond could be allowed future credit until such bond was fully paid.

Smugglers, too, soon came to realize the energetic character of the new administration. Accustomed to ply their trade almost with impunity, they now found that infractions of the law were followed by vigorous prosecution. Before the first month of the new regime had gone by several of these offenders were caught and heavily fined.[38]

Another effect of the federal Constitution upon state laws passed during the period of the Confederation is presented in the discontinuance of the state admiralty courts after 1789.

During the colonial period, vice-admiralty courts had been established in the different colonies, the commissions emanating from the crown. They had, added to the usual jurisdiction, the cognizance of all cases of seizure afloat for the violation of the revenue laws. For this reason they were very unpopular at the outbreak of the Revolutionary war. Nevertheless the need of some such court was patent, and upon the recommendation of

[37] Maryland Journal, January 12, 1790.

[38] American Museum, VIII. Appendix 4, p. 4. The newspapers also speak of the activity of the government in this respect.

Congress of November 25, 1775,[39] admiralty courts were generally erected by the states. In some instances there was merely a change in the personnel of the judges, the old courts being retained. In others, new courts were established with well defined powers. Amendments were passed from time to time until by 1789 much dissimilarity existed in the jurisdiction exercised in different states. But no matter what the provisions of the various laws, they were alike forceless after the organization of the new government.[40]

One of three courses was open to the state legislatures. They might take no action whatever upon the subject, in which case their admiralty laws would become obsolete through the precedence of the Federal Constitution and laws; they might omit to make provision for the admiralty courts in the re-codification of the state laws or in the revised state constitutions, which omission would amount to a repeal; or they might specifically repeal parts or all of their admiralty laws. As it turned out, each of the three courses was followed by about an equal number of states.

Pennsylvania, one of the states which adopted the last method, apparently feared that the judge of the admiralty might be legally able to hold the state for his salary even after he no longer had any court over which to preside. At any rate the act of December 7, 1789, recited the fact that the United States District Court had exclusive jurisdiction of admiralty causes and declared it inexpedient to continue a salary after the duties of the office had ceased. Francis Hopkinson was the last judge of the admiralty of Pennsylvania, but upon the passage of the United States judiciary act in September, Washington appointed him United States district judge for the district of Pennsylvania. He himself had

[39] Journal of the Continental Congress, new ed., III. 373.

[40] Article III, section 2, of the Constitution, provides that the judicial power of the United States shall extend to all cases of admiralty and maritime jurisdiction.

evidently come to the conclusion that the state law was superseded and void even before the passage of the act of Decemebr 7, for under date of November 6, 1789, he advised the Council to take some measure for the safe keeping of the records of the "late court of admiralty." The last recorded payment of salary to Hopkinson as judge of the admiralty was for the quarter ending September 13, 1789.

In Virginia an act of December 22, 1788, provided that the cases in which the court of admiralty had jurisdiction, and which were not taken away by the Constitution of the United States, were to be transferred to the district courts of the state. Another act, a few days later, discontinued the salaries of the admiralty judges, and the court of admiralty, after March 4, 1789.[41]

The naturalization clause of the Federal Constitution transferred also to the central government power which the states had exercised under the Articles of Confederation. The provision of the Articles that the free inhabitants of each of the states be entitled to all the privileges and immunities of free citizens in the several states, had only rendered more chaotic a condition already bad enough. States with stringent naturalization rules soon had cause for complaint against the states with easy admission requirements. It was felt that there ought to be a uniform practice, and this feeling, expressed in the Convention, led to the provision in the Constitution that Congress should have power "to establish a uniform rule of naturalization." Nothing was done in the first session of Congress to provide such uniformity, but in 1790, following a recommendation in Washington's first annual message, the first Federal law upon the subject was passed.[42] "The governing ideas," says Maclay in his report of the debate in the Senate over the bill, "seemed to be the following: That the holding property was separable from and not absolutely connected with naturalization; that laws and regulations relating to property, not

[41] Hening, XII. 769.

[42] United States Statutes at Large, I. 103.

being among the powers granted to Congress, remained with the different states"[43] There is no record of any of the states specifically repealing their old naturalization laws upon the passage of the national act, but, exercising the right which Maclay says remained to them, several of them did pass acts prescribing the terms upon which foreigners could hold property within their boundaries.

Again, under the Articles of Confederation, the states shared with Congress the power of coining money, of emitting bills of credit, and of making their promissory notes a legal tender for debts, while the new Constitution placed such powers in the hands of Congress alone.[44] Those states which had established mints were forced to suspend operations,[45] while at the same time provision had to be made to take the state paper money out of circulation.[46] Hamilton's funding measure, too, upset the states' financial legislation. All had taken some action to provide for their public indebtedness, but after the passage of the assumption measure in 1790 they were enabled either to repeal these special measures or to turn the proceeds arising from this legislation to other accounts. Massachusetts had passed an excise act in March, 1790, the revenue from which it was proposed to appropriate to the payment of interest on the debt of the commonwealth. But in the following June the probability of the success of the national funding scheme was so great that the legislature was

[43] William Maclay, Sketches of Debate in the First Senate of the United States, p. 181.

[44] Art. 1, section 8, clause 5; and section 10, clause 1.

[45] Thus the legislature of Connecticut in May, 1789, suspended a license previously granted to certain persons in New Haven to manufacture copper coin. Gazette of the United States, July 8, 1789.

[46] A correspondent of the New Jersey Journal and Political Intelligencer, October 7, 1789, concluded that the New Jersey paper money had not had, since the previous March 4, any legal tender value in compulsory payments of debts.

induced to repeal conditionally the act of the previous March.[47] When the legislature met again the following September, the funding scheme was an assured fact, and so the state excise law was finally and unprovisionally repealed. North Carolina, in December, 1789, as a means for the payment of the state debt, levied a tax of two shillings per hundred acres of land, five shillings per £100 value of town lots with their improvements, and five shillings per poll. This was to be in force till the state debt was paid, but the passage of the national assumption act a few months later rendered this tax unnecessary, and it was repealed in December, 1790.[48] In New Jersey an act passed in 1787 to raise £12,500 per annum for twenty-two years to pay interest on the state debt was repealed November 18, 1790.

The old Congress had, in 1785, taken advantage of its right to regulate the coinage, and had adopted the decimal system, but had taken no action to displace the worn out currency with coinage of the new system. As a result the states simply kept their old systems in force. This chaotic condition of the currency existed until 1792 when Congress passed remedial legislation. The decimal system was definitely established, and provision made for the coinage of a large amount of new currency. It thus became a matter of convenience for the states to have the same legal money of account as the United States, and one after another they gradually adopted the decimal system.

In two additional ways the central government after 1789 lessened the expenditures of the state governments—by its maintenance of lighthouses and by its payment of military pensions. By act of August 7, 1789, Congress provided that the expenses of keeping lighthouses, beacons, buoys, and public piers in order should be borne by the United States after August 15, 1789, provided cessions of such should be made to the United States within one year. The measure was so obviously calculated to

[47] Laws of Massachusetts, II. 87, June 24, 1790, Ch. xiv.

[48] Laws of North Carolina, Iredell's ed., 1791, pp. 666, 701.

produce more uniformity in the regulation of commerce, at the same time considerably reducing the running expenses of the states, that nearly all such places were ceded to the central government within a few months. The acts of cession were usually short and to the point, containing little beyond the mere transference of the place in question. The Pennsylvania act declared it was necessary to make the cession in order that the power of Congress over commerce might be carried into effect. The preamble to the Delaware act reported that Delaware was "desirous to promote general regulations respecting lighthouses, beacons, boys [*sic*] and public piers." New York and New Hampshire provided that if the United States should make any compensation to other states for like cessions, such compensation should be made to them in proportion to the respective values.

The payment of military pensions had been made, during and after the war, by the various states, the laws of which on this subject had been as varied as could possibly be the case with thirteen distinct legislatures struggling with the question. But by a resolution of June 7, 1785, Congress had recommended to the states definite and uniform provisions for officers, soldiers and seamen disabled in the service of the nation. Regulations for carrying out these provisions were to be left to the legislatures, and state officers rather than national officers were to pass upon the eligibility of persons applying for pensions. The total amount paid out by a state for such purposes was to be deducted from the requisitions of Congress upon that state. It is to be noticed, however, that this "deduction" did not lessen a state's expenses, for the requisitions against it had to be increased proportionately. Instead of being a party to the transaction, and of making payments directly to the pensioners, the states in theory now passed the money over to Congress, which handed it back to be distributed. In this, as in other matters, the states became the agents of Congress simply because the Articles of Confederation provided no point of contact for the central government with

the individual. This defect was remedied in the Federal Constitution, and an act was passed in the first session of Congress providing that these military pensions should now be paid by the United States under such regulations as the president might direct.[49] In the middle of October, 1789, Secretary of War Knox sent out a circular containing the regulations under which the payments were to be made. The pensions for the year beginning March 4, 1789, were to be paid in two instalments,—March 5, 1790, and June 5, 1790.[50] States were to furnish lists of their pensioners before the first payment was due. A second circular was issued January 28, 1790, giving more detailed information as to the places of payment, and naming the persons who were to make the disbursements.[51]

Both by the maintenance of lighthouses and by the administration of these new pension laws did the new central government impress the individual. It not only encountered the individual at more points than had the government under the Confederation, but it demanded a greater respect than had been shown its predecessor. It was to be satisfied with no divided allegiance. Its Constitution and laws were to be supreme over state constitutions and laws, and to insure supremacy state officers were to be bound by oath to give proper support. The first act passed by Congress[52] prescribed the form of the oath and enacted that it should be administered to persons in office within one month after the first of the following August, and

[49] This law provided for the payment only from March 4, 1789, to March 4, 1790, but subsequent laws extended the time indefinitely.

[50] This long delay probably produced considerable suffering, to alleviate which at least one state, Pennsylvania, advanced monthly sums to the pensioners during the winter 1789-1790. These were to be re-paid to the state March 5, 1790. Act of November 20, 1789.

[51] Maryland Journal, February 12, 1790.

[52] June 1, 1789. An act to regulate the time and manner of administering certain oaths. Statutes at large, I. 23.

to persons thereafter filling the offices before they entered upon their duties.

Five months before the passage of this act the Connecticut assembly had taken the initiative and had prescribed an oath of fealty to the new Constitution. This was the only legislature to take action before the passage of the Congressional act. The Connecticut act was repealed the following October without any explanation, but possibly it was felt that the act of Congress was all-sufficient, possibly also because the oath prescribed by the state was slightly different from that of Congress. In May a grand jury of Washington county, Virginia, had presented as a grievance the want of a law giving the form of an oath of fidelity to the federal government. According to the jury, the existing officers had been placed in a serious position; no oath or affirmation had been provided by the last assembly, and no future assembly could remedy the evil because, they said, "we find they are precluded by Article 1st where it is said, 'no *ex post facto* law shall be passed.' "[53] No remedy was suggested, but the publication of the Act of Congress in the Virginia papers early in the following July probably eased the minds of those sticklers of form.

The Act of Congress, in itself, without state action, was sufficient to carry the provision of the Constitution into effect. But the idea that the state governments were intermediary between Congress and the people could not be uprooted at once. The states may also have felt that no outside government should be permitted to prescribe a form of oath for state officers without consent of the legislature. Whatever the cause, the majority of the legislatures re-enacted the federal law. New York made the neglect or omission of the oath a misdemeanor, indictable and punishable by fine and imprisonment. On the other hand, the legislature of North Carolina in 1790 refused by a large majority to take the oath to the national Constitution. The New Hamp-

[53] Pennsylvania Packet, June 30, 1789.

shire legislature in June, 1789, re-enacted the Congressional law. In the following January the same body passed an interesting resolution, showing that it recognized an important change in the character of the state government, in consequence of the change in the national government. This resolution, after stating that the adoption of the Federal Constitution had made necessary some alterations in the oath of allegiance to the state, prescribed by the state constitution, directed that in the future administration of the oath, the word "confederated" be substituted for the words "sovereign and independent."[54] A related subject to the foregoing was the question of the eligibility of persons to hold office simultaneously under both state and national governments. Each one of the thirteen states, with the exception of Rhode Island, passed laws or resolutions, or incorporated provisions in the state constitutions upon this subject, and usually such eligibility was denied. In agitating the question it was observed that a person could not serve "two sovereign organizations" at the same time. It was felt too that certain departments of government should be kept separate, and the danger of collision between the state and national governments was dwelt upon. Of more operative influence was the simple reason that a man could not be in two places at once—the duties of one office would interfere with those of the other. Two or three examples of state action will suffice to illustrate the general feeling. The New York assembly passed a series of resolutions in January, 1790, taking the singular and untenable position that it was incompatible with the United States Constitution for any person holding an office under the United States government to have a seat at the same time in the state legislature. This action rendered vacant the seats of four state senators, among them United States District Judge James Duane, and United States Senator Philip Schuyler. The mischievous effect of this form of plural office holding was experienced by the first Congress in the case of Charles Carroll,

[54] State Papers of New Hampshire, XXI. 726.

Senator from Maryland. Carroll was also a member of the state senate, and during 1790 and 1791 absented himself from Congress during the early winter until the adjournment of the state legislature. Notwithstanding his vigorous opposition, the state legislature passed an act in December, 1791, incapacitating United States officers and members of Congress from holding office under the Maryland government. From Massachusetts one of the first representatives to Congress was a probate judge, another was a sheriff. Governor Hancock, at a loss as to the proper mode of procedure in such cases, sent a special message to the legislature asking its advice. The latter replied that if the probate judge continued to hold both his offices a future legislature would authorize the governor to name some other person to execute the duties of the office of probate judge. As to the sheriff, such officers were removable at the pleasure of the executive, and therefore the legislature declined to advise the governor on that point.[55] In January, 1790, after a long debate occasioned by a specific case, it was voted by a large majority that persons holding government offices, similar in nature to those state offices declared by the constitution of Massachusetts incompatible with the holding of seats in the legislature, could have no constitutional right to retain their seats.[56] Perhaps the most interesting debate occurred in 1791, when David Sewall, United States District Judge, appeared to claim his seat as a duly elected member of the legislature from York. In the course of the consideration of his eligibility, it was held that he occupied a place of profit and trust under a foreign government, and for this reason, and the additional one that the legislature and judiciary should be kept separate, Sewall was excluded by an almost unanimous vote.[57]

[55] Laws and Resolves of Massachusetts, 1788-1789, p. 744.

[56] Massachusetts Centinel, January 23, 1790.

[57] Dunlap's American Daily Advertiser, February 14, 17, 1791.

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II. **Official publications exclusive of laws.** These include the Journals and Minutes of the several state assemblies, reports of state legislative committees, Journals of the two Houses of Congress, and reports of various officials and committees to Congress. Not all of the state legislatures printed their Journals from session to session, but more recently several of the states have printed large collections of invaluable historical material, including legislative Journals, calendars of documents, official letters, etc.

III. **Newspapers.** The contemporary newspapers of the transitional period have furnished the writer much of his illustrative material. In addition, the newspapers frequently contain fuller reports of legislative meetings than can be found in official publications. The writer has examined the files in the possession of the American Antiquarian Society at Worcester, those of Harvard University Library, of the Boston Public Library, of the Library of the Rhode Island Historical Society, of the New Jersey State Library, of the Library of the Historical Society of Pennsylvania, and of the Library of Congress.

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